91-1803

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

IN RE: TRANSCONTINENTAL ENERGY CORPORATION,
Debtor.

RICHARD A. DAVIS, TRUSTEE,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Department of Energy's allowed claim for the crude oil overcharges should have been disallowed as a penalty and not restitution pursuant to Section 57(j) of the Old Bankruptcy Act of 1898.

LIST OF ALL PARTIES TO THE PROCEEDINGS

The parties to this proceeding are listed in the caption, and are TRANSCONTINENTAL ENERGY CORPORATION [hereinafter "Debtor"]; RICHARD A. DAVIS, TRUSTEE [hereinafter "Petitioner"] and UNITED STATES DEPARTMENT OF ENERGY [hereinafter "Respondent."]

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PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Richard A. Davis, Trustee, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the Temporary Emergency Court of Appeals of the United States, sitting per curiam, entered in the above-entitled proceeding on October 31, 1991.

OPINIONS BELOW

The Bankruptcy Court for the United States District Court for the District of Nevada, the Honorable Lawrence Ollason, Bankruptcy Judge entered his Final Order which held, under former Section 57(j) of the Bankruptcy Act of 1898, a debt owing to the United States as a penalty as being disallowed, and is reprinted in the Appendix hereto. The Department of

Energy appealed this Order to the United States District Court for the District of Nevada.

On February 15, 1989, the Department of Energy filed a Motion for Reconsideration of the findings of Fact and Conclusions of Law and Order issued on January 23, 1989. On April 24, 1989, the Department of Energy filed an Amended Motion for Reconsideration of the Findings of Fact and Conclusions of Law and Order issued on January 23, 1989.

Petitioner filed a Response to the Amended Motion for Reconsideration on May 26, 1989. On June 19, 1989, the Bankruptcy Court denied the Department of Energy's Motion for Reconsideration.

On June 28, 1989, the Department of Energy filed a Notice of Appeal with the Bankruptcy Court Clerk, appealing the Bankruptcy Court's Final Order on June 22, 1989, to the United States District Court District of Nevada.

On August 20, 1990, the Honorable Philip M. Pro, United States District Judge for the District of Nevada entered his Opinion reversing the Bankruptcy Court's Final Order and granted the Department of Energy an allowed unsecured claim for $372,151.67. The Opinion of the District Court is reprinted in the Appendix hereto. The District Court adopted the position of the Department of Energy by finding that its claim was for restitution rather than a penalty.

On August 23, 1990, the Trustee timely filed its Notice of Appeal of the District Court's Order to the United States Court of Appeals for the Ninth Circuit.

On or about April 5, 1991, the Department of Energy filed a motion to transfer the appeal to the Temporary Emergency Court of Appeals of the United States.

The Trustee filed his Opposition to the Motion to Transfer the Appeal to the Temporary Emergency Court of Appeals of the United States.

On May 23, 1991, the United States Court of Appeals for the Ninth Circuit issued its Order transferring the appeal to the Temporary Emergency Court of Appeals.

On October 31, 1991, the Temporary Emergency Court of Appeals of the United States issued its decision affirming the United States District Court for the District of Nevada. The judgment herein sought to be reviewed, is reprinted in the Appendix hereto.

JURISDICTION

The jurisdiction of the United States Bankruptcy Court for the District of Nevada was invoked pursuant to Chapter XI of the Bankruptcy Act of 1898, as amended, on October 14, 1977, pursuant to 28 U.S.C. Sections 1334 and 157(b)(2).

The United States Bankruptcy Court for the District of Nevada on January 23, 1989, entered its Final Order on cross motions for summary judgment finding that the Respondent's claim, pursuant to Section 57(j) of the Bankruptcy Act, may not be disallowed as a penalty, but that it is nevertheless subject to the Bankruptcy Act.

On Respondent's Appeal to the United States District Court for the District of Nevada, the District Court on August 20, 1990, entered its Opinion reversing the Final Order of the Bankruptcy Court and granted the Respondent's allowed unsecured claim for $372,151.67. See Appendix.

On August 23, 1990, Petitioner timely filed its Notice of Appeal of the District Court's Order to the United States Court of Appeals for the Ninth Circuit. See Appendix.

On April 5, 1991, Respondent filed a Motion to Transfer the Appeal to the Temporary Emergency Court of Appeals of the United States ("TECA") pursuant to the Economic Stabilization Act of 1970. See Appendix.

Petitioner thereafter filed his Opposition to the Motion to Transfer the Appeal to the TECA. See Appendix.

On May 23, 1991, the United States Court of Appeals for the Ninth Circuit issued its Order transferring the Appeal to the TECA. See Appendix.

On October 31, 1991, TECA *per curiam* entered its decision affirming the Order of the District Court. See Appendix.

The jurisdiction of this Court to review the decision of the Temporary Emergency Court of Appeals of the United States is invoked under 28 U.S.C. Section 1254(1). This Petition is timely filed ninety days thereafter as provided in 28 U.S.C. Section 2101(c).

STATUTES INVOLVED

Section 57(j) of the Bankruptcy Act provides:

> Debts owing to the United States or to any States or any subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose. . . .

STATEMENT OF THE CASE

THE FACTS

This is a case originally arising under Chapter XI of the Bankruptcy Act of 1898 Section 57(j). Transcontinental Energy Corporation, a Nevada Corporation (hereinafter "Transcontinental"), filed a petition in bankruptcy under Chapter 11 of the Bankruptcy Act of 1898. The Department of Energy (hereinafter "DOE") filed a proof of claim based upon overcharges made by Transcontinental in the sale of crude oil in violation of Section 209 of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. Section 1904, n., as incorporated by reference along with jurisdictional provisions pertaining to the Temporary Emergency Court of Appeals of the United States by the Emergency Petroleum Allocation Act, 15 U.S.C. Section 754(a)(1).

Richard A. Davis, the court appointed Trustee of Transcontinental, (hereinafter "the trustee") filed an objection to the DOE's proof of claim, contesting the merits of the DOE's underlying allegations and asserting that the claim was for a "penalty" which must be disallowed under Section 57(j) of the Bankruptcy Act. The Honorable Lawrence Ollason, Bankruptcy Judge, agreed with the Trustee and held that DOE's claim constituted a penalty. On appeal to the District Court by DOE, the District Court reversed the bankruptcy judge in reliance upon the Temporary Emergency Court of Appeals decision in *United States v. West Texas Marketing Corp.*, 763 F.2d 1411, 1426 (Em. App. 1985). The Honorable Philip M. Pro, United States District Judge, held that *West Texas Marketing* controlled in this matter and that DOE's claim was improperly subordinated to the extent that the DOE was unable to specifically identify overcharge victims.

Following the opinion of the District Court, the Trustee appealed to the United States Court of Appeals for the Ninth Circuit. The DOE filed an objection to the appeal before the Ninth Circuit, requesting that the matter be heard before the Temporary Emergency Court of Appeals for the United States. The Ninth Circuit Court granted the DOE's motion to transfer appeal.

On October 31, 1991, the Temporary Emergency Court of Appeals of the United States issued its decision based upon the briefs of the parties, affirming the district court's opinion. The Trustee, as the Petitioner herein, now seeks review of the Temporary Emergency Court of Appeals' decision by a writ of certiorari pursuant to 28 U.S.C. Section 1254(1).

REASONS FOR GRANTING THE WRIT

The significant reasons why this Court should grant a writ of certiorari and decide this case are discussed below.

THE DISTRICT COURT AND THE TEMPORARY EMERGENCY COURT OF APPEALS COMMITTED REVERSIBLE ERROR BY NOT ACCEPTING THE BANKRUPTCY COURT'S FINDINGS OF FACT

The standard for review of factual findings is provided in Bankruptcy Rule 8013: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." The standard does not permit a trier of fact to be overturned "simply because [district court] is convinced it would have decided the case differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed. 2d 518 (1985). Where two permissible con-

clusions can be drawn, the factfinder's choice cannot be clearly erroneous. *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 309 (7th Cir. 1988). Thus, where the factfinder's choice is not clearly erroneous, the District Court must defer with respect to the findings of fact. *Matter of Leonard*, 849, F.2d 974 (5th Cir. 1988); *In re First South Savings Association*, 820 F.2d 700, 711 (5th Cir. 1987).

Although non-bankruptcy law creates the Respondent's claim, it is bankruptcy law that determines the priority of that claim in bankruptcy. *In re Seneca Oil Co.*, 906 F.2d 1445, 1454 (10th Cir. 1990).

By language of Rule 8013, Findings of Fact made by the Bankruptcy Judge are not to be set aside on appeal unless they are "clearly erroneous." *In re Morrisey*, 717 F.2d 100, 104 (3rd Cir. 1983). The Bankruptcy Court's Findings of Fact were not erroneous and Judge Pro committed error by not accepting Judge Ollason's Findings of Fact. Thus, the Bankruptcy Court did not err in treating the Respondent's claim as penalty to the extent that Respondent failed to identify specific overcharged victims which resulted in subordinating the Respondent's claim to all other allowed general unsecured claims. *In re West Texas Marketing Corp.*, 82 B.R. 829 (Bkrtcy. N.D. Tex. 1988).

SUBSTANCE OF A CLAIM OR TRANSACTION IS WHAT THE COURT SHOULD LOOK TO, NOT ITS FORM

Respondent argued that its interpretation of 11 U.S.C. Section 726(a)(4) of the Bankruptcy Code "subordinates" rather than "disallows" penalty claims, a difference which the district court and the Temporary Emergency Court of Appeals considered immaterial. However, a court that applies the provi-

sions of the Code to a set of facts must always look beyond the form of a transaction to its substance, *Pepper v. Litton*, 308 U.S. 295, 305, 60 S.Ct. 238, 244, 84 L.Ed. 281 (1939), a feat that can be accomplished with minimum time and effort here.

It is uncontested that Respondent's claim was filed under Chapter 11 of the Bankruptcy Act of 1898, based upon overcharges made by Transcontinental in the sale of crude oil in violation of Section 209 of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. Section 1904, n. Therefore, this Court must determine whether Section 57(j) of the Bankruptcy Act applied in the instant case or the new version 11 U.S.C. Section 726(a)(4). In *In re Sounds Distrib., Inc.*, 80 B.R. 749, 751-52 (Bankr. W.D. Pa. 1987) the court held that "the controlling date in determining the applicability of the 1984 amendments was the date the debtors filed their bankruptcy petition rather than the date the trustee commenced adversary proceedings." In *In re Republic Trust & Sav. Co.*, 897 F.2d 1041 (10th Cir. 1990) the trustee asserted that, because the debtors filed their bankruptcy petition before the amendments became effective, the pre-amendment version of subsection governed and barred appellants' defense. The Tenth Circuit agreed with the trustee's assertion and affirmed the district courts' decision in rejecting appellants' claimed exemption. Likewise, Section 57(j) of the Bankruptcy Act should have been applied in lieu of its replacement 11 U.S.C. Section 726(a)(4).

In *In re Erlin Manor Nursing Home, Inc.*, 86 B.R. 307, 314 (D. Mass. 1985) the Court was presented with the issue of whether the negative equity assessments were penalties under federal bankruptcy law. The court, relying on *Idak Corp. v. Hiam*, 19 B.R. 765 (Bankr. D.Mass. 1982) held that "the assessments in fact were intended to compensate the Commonwealth for the debtor's increased operating costs," and

thus were a penalty and dischargeable in full. "A bankruptcy case commenced before October 1, 1979, the effective date of the Code, continues to be governed by the provisions of the Old Act." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, Section 403, 1978 U.S. Code Cong. and Ad. News (92 Stat.) 2549, 2683 (codified at 11 U.S.C. prec. Section 101 (1982)).

The Temporary Emergency Court of Appeals, relied on its earlier holding in *U.S. Dept. of Energy v. West Texas Marketing Corp.*, 763 F.2d 1411 (Em. App. 1985) in order to affirm the district court's decision. However, the facts in *West Texas Marketing* are misplaced in light of the instant case. To begin with in *West Texas Marketing*, the DOE filed its proof of claim under the bankruptcy code. Secondly, there is no indication in the record whether the trustee had in fact challenged the merits of the DOE claim. Thirdly, the bankruptcy judge did not decide whether the DOE's claim was allowed or disallowed.

In the instant case, the Bankruptcy Court found that: (1) respondent's claim is a claim for restitution which may not be disallowed as a penalty, but which is nevertheless subject to the Bankruptcy Act;(2) The Petitioner challenged the Respondent's claim and was granted judgment; (3) the Bankruptcy Act mandated that available funds be distributed to creditors with identifable claims; (4) distribution of the overcharges to the treasuries of the state and federal government is contrary to the spirit and intent of the Bankruptcy Act.

The District Court and the Temporary Emergency Court of Appeals failed to discuss or consider the above factors while applying *U.S. Department of Energy v. West Texas Marketing Corp.*, 763 F.2d 1411 (Em. App. 1985) to the instant case. Furthermore, the Temporary Emergency Court of Appeals' only comment regarding these factors was summarily dis-

missed by the statement "[t]his appeal revisits, with a little change of scenery, the central issue decided in *U.S. Department of Energy v. West Texas Marketing Corp.*, 763 F.2d 1411 (Em. App. 1985)." However, three years later, the Bankruptcy Court on remand in *In re West Texas Marketing Corp.*, 82 B.R. 829 (Bkrtcy. N.D. Tex. 1988) adopted the very same position of the Bankruptcy Court below in its earlier decision that required the DOE to identify the injured parties with particularity if in fact restitution is sought on behalf of the parties injured by the overcharges. The Bankruptcy Court on remand stated at page 831:

> "The purpose of the Bankruptcy Code is to make as large a distribution as possible to the identified creditors of the Debtor; the purposes of the Bankruptcy Code would not be served by adding to state and federal treasuries. The Court will establish a procedure for the DOE to make such identification and for a speedy review of such identification by the Trustee so that this long-pending case can move toward a conclusion."

The DOE has heretofore cited the Courts below to the United States District Court for the Northern District of Texas in *In re: Compton Corp.*, 90 D.R. 798 (N.D. Tex. 1988). In *In re: Compton Corp.*, the Bankruptcy Court has originally subordinated the claim of the DOE under 11 U.S.C. Section 726(a)(4). On Appeal to the United States District Court for the Northern District of Texas, the District Court found itself constrained to follow the decision of the Temporary Emergency Court of Appeals in *West Texas Marketing, supra.* In determining itself bound by *West Texas Marketing*, the following language of the District Court is most telling when it comes to the reasoning, if any behind *West Texas Marketing.*

> "However, while this Court is of the opinion that the authorities proffered by Compton are well reasoned and arguably quite consistent with a major policy underlying the Bankruptcy Code, to-wit, conservation of the estate's assets so there may be equitable distribution of same to those creditors who have suffered pecuniary loss, we are constrained to follow the dictates of the TECA as expressed in *West Texas Marketing, supra.*" *In re Compton,* at page 801.

It is apparent from a careful reading of *In re Compton Corp., id.*, that the United States District Court, although not swayed by the reasoning of West Texas Marketing, felt bound by its holding that a claim under Section 209 of the Energy Stabilization Act is a claim for restitution, because the DOE says it is.

Appellant submits that the reasoning of *West Texas Marketing* is circuitous and flies in the face of well established Bankruptcy law and policy for the following reasons:

1. The DOE has acknowledged that it often is unable to locate and reimburse the actual injured parties or entities whom it asserts a claim under Section 209 of the Energy Stabilization Act. See *In re Compton*, 90 B.R. at 801, footnote n.5.

2. The DOE's claim is not "clearly for restitution and not for penalty," if the recovered funds are not expressly earmarked for injured parties.

3. *West Texas Marketing* completes the circle of its reasoning by refusing to inquire as to whether the claim of the Department of Energy is for actual pecuniary loss, solely because of its holding that a claim of the Department of Energy is for restitution and not for a penalty, 763 F.2d at 1426.

4. The Bankruptcy Reform Act of 1898, applicable here, evidences a stricter account as to whether or not a claim is for a penalty, because of the result under Section 57(j) of the Act that such a claim is *disallowed*, not merely subordinated.

For some unknown reason, this Court has, up until now, not had an opportunity to review the faulty and inaccurate reasoning and policy of *West Texas Marketing*. As shown above, Courts are following the dictates of *West Texas Marketing*, not because of sound reasoning, but because of its mandate. In actuality, a specialized Court of Appeals has set on its end long established bankruptcy law with its statement that the DOE's claim was "clearly for restitution and not for a penalty." 763 F.2d at 1426.

One cannot help but respectfully ask the question: if it were so clear that a claim by the DOE was for restitution and not for a penalty, why did every Bankruptcy Court presented with the issue prior to the decision of the Temporary Emergency Court of Appeals in *West Texas Marketing* conclude that the Department of Energy's claim was not claim for restitution but was, in fact, a penalty?

CONCLUSION

For the above reasons, this Petition for Certiorari should be granted. It is important that Petitioner and others in like circumstances have a clear interpretation of the Bankruptcy Act under facts of this case with emphasis on penalty and whether the Bankruptcy Code operates in similar fashion under Section 726(a)(4). The Temporary Emergency Court of Appeals' decisions cannot be reconciled with the valid and established policy that in bankruptcy, there must be parity among creditors who have, in fact, suffered actual pecuniary loss. Otherwise, the Department of Energy will receive a distribution at the direct expense of all other general unsecured creditors — a result which Congress could not have intended.

Respectfully Submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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Chapter 11
BK-S-77-730

IN RE:
TRANSCONTINENTAL ENERGY CORPORATION,
Debtor.

RICHARD A. DAVIS, TRUSTEE,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF ENERGY,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The contested claim of the U.S. Department of Energy ("DOE") came before this court on cross motions for summary judgment. Having duly considered the arguments and submissions of counsel, the court finds and concludes as follows:

1. Transcontinental Energy Corporation ("TEC"), a Nevada Corporation, filed a petition for bankruptcy under Chapter XI of the Bankruptcy Act of 1898, as amended, on October 14, 1977.

2. By order dated October 21, 1977, the court appointed Robert N. Broadbent as Receiver. On October 4, 1978, TEC was adjudicated bankrupt, and Mr. Broadbent was appointed Trustee. In March 1981, Richard A. Davis succeeded Mr. Broadbent as Trustee.

3. Interests in two oil wells in Long Beach, California, the "Moore Well" and the "Harrison Lease," were among the assets of the debtor at the time of filing.

4. TEC was engaged in the business of producing and selling crude oil from 1975-80, during the period when mandatory petroleum price and allocation regulations were in effect. In late 1978, the DOE conducted an audit of TEC's pricing practices, which audit resulted in the issuance of a notice of probable violation by the DOE to TEC on March 30, 1979.

5. The DOE filed a proof of claim in this case on April 4, 1979, and an amended proof of claim on October 22, 1985, for overcharges revealed by the above referenced audit.

6. The Trustee filed an objection to the DOE's claim on December 4, 1980, as to both the validity and the calculation of the alleged overcharges.

7. On November 25, 1985, the DOE filed a motion for summary judgment. The Trustee filed an opposition to the DOE's motion and a cross motion for summary judgment on January 31, 1986. On March 7, 1986, the DOE filed its reply to the Trustee's opposition and its opposition to the Trustee's motion. The Trustee replied to the DOE's opposition on May 8, 1986.

8. On August 19, 1986, this court issued a minute entry order granting summary judgment in favor of the trustee and against the DOE, and directing the Trustee to lodge proposed findings of fact and conclusions of law.

9. On September 27, 1988, the Trustee submitted proposed findings of fact and conclusions of law. Objections thereto were heard on September 30, 1988, at which time the DOE informed the court that the authority upon which the Trustee had relied, *In re Compton*, 40 B.R. 880 (N.D. Texas, 1984), had been

reversed. *See In re Compton*, No. CA4-86-647-K (N.D. Texas, August 9, 1988), *appeal docketed* No. 88-1680 (*5th Cir.*, 1988). This court stated that it would reconsider its minute entry order, and directed the Trustee to submit findings of fact and conclusions of law in that connection. That matter was heard on November 7, 1988.

10. Pursuant to the emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. Section 751 *et seq.*, the DOE issued regulations which established price controls on the sale of crude oil. 10 C.F.R. Sections 210 and 212.

11. A "producer" of crude oil is a firm which produces crude oil or owns crude oil when it is produced, 10 C.F.R. Section 212.31. TEC was a producer of crude oil between 1975 and 1980 and was thus subject to the EPAA and the regulations promulgated thereunder.

12. Oil produced from "stripper wells" was exempted from price controls except for the period between February 1, 1976 and August 31, 1976, when such crude oil was subject to the "upper-tier" ceiling price rule. 6 C.F.R. Section 150.54(s) and 10 C.F.R. Section 212.74.

13. A "stripper well" is one whose average daily production ("ADP") did not exceed 10 barrels per day during a previous 1 year period. *See* , 6 C.F.R. Section 150.54 (38 Fed. Reg. 34464 and 34465, December 14, 1973) and 10 C.F.R. Section 210.32(b); 10 C.F.R. Section 210.32(b); 10 C.F.R. Section 212.54 (the various regulations reflect technical amendments to the definition of stripper wells and the prior 1 year period).

14. The Harrison Lease had an ADP from 1972 through 1974 in excess of 10 barrels per day each year. In 1975, the Harrison Lease production averaged less than 10 barrels per day, thus qualifying it as a stripper well effective January 1, 1976.

15. From January 1975 through December 1975, TEC sold the Harrison Lease production at stripper well prices, notwithstanding that it did not so qualify, This resulted in the receipt by TEC of illegal overcharges in the amount of $20,353.46, and the accumulation of pre-petition interest in the amount of $4,140.91. The affidavit of Darrell W. Smith (attached to DOE's motion for summary judgment) sets forth the DOE's audit methodology and results, which are uncontested by TEC.

16. The Moore Well's ADP from 1972 through 1980 was in excess of 10 barrels per day each year. Consequently, the crude oil produced from the well for this period did not qualify as stripper well oil.

17. From March 1975 through December 1980, the Moore Well production was sold at stripper well prices. This resulted in illegal overcharges received by TEC totalling $333,025.93, and pre-petition interest accumulation in the amount of $14.631.37. TEC does not dispute the receipt of these overcharges. The affidavit of Darrel W. Smith sets forth the DOE's audit methodology and results.

18. The Economic Stabilization Act of 1970 ("ESA"), as incorporated into the EPAA, contains two sections: one which authorizes the DOE to seek restitution of illegal overcharges (Section 209 of the ESA, 12 U.S.C. Section 1904) and one which authorizes the DOE to seek civil or criminal penalties (Section 210 of the ESA). *See* EPAA, 15 U.S.C. Section 754(a)(1) and (3).

19. Under former Section 57(j) of the Bankruptcy Act, applicable in the present case, a debt owing to the United States as a penalty is disallowed. Section 736(a)(4) of the Bankruptcy Code, which amended Section 57(j), is substantially similar to the former section except that it subordinates rather than disallows penalty claims.

20. Although the notice of probable violation attached to the DOE's proof of claim made reference to potential assessment of penalties under 10 C.F.R. Section 205.203 (up to $20.00 per day), none were ever assessed against TEC. Instead, the DOE's claim is based solely on Section 209 of the ESA, and it seeks a dollar for dollar refund of unlawful overcharges by TEC.

21. The DOE cannot presently identify any of the entities who were overcharged by TEC and for whom it seeks restitution of the illegal overcharges; however, the DOE can and will employ appropriate measures to determine the identity of and injury to each victim.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this matter pursuant 28 U.S.C. Sections 1334 and 157(b)(2).

2. The DOE is entitled to an allowed claim for illegal overharges in the amount of 353,379.39 and to pre-petition interest thereon in the amount of $18,772.28. Said claim is properly made on behalf of numerous private persons notwithstanding their independent right to make such claim. *In re West Texas Marketing*, 82 B.R. 829, 830-31 (S.D. Tex, 1988) (on remand); *see In re Evans Products Co.* 60 B.R. 863 (D.C. S.D. Fla. 1986).

3. The DOE's claim is a claim for restitution which may not be disallowed as a penalty, but which is nevertheless subject to the Bankruptcy Act. *United States v. West Texas Marketing Corp.*, 763 F.2d 1411, 1426 (TECA, 1985).

4. The DOE's claim for restitution is a general unsecured claim; however, any portion thereof which cannot be returned to an overcharge victim is payable to the treasuries of state and federal governments. 51 F.R. 27899 (August 4,1986).

5. The Bankruptcy Act mandates that available funds be distributed to creditors with identifiable claims. *In re West Texas Marketing*, 82 B.R. 829, 830-31 (S.D. Tex, 1988) (on remand).

6. A distribution of the overcharges to the treasuries of state and federal governments is contrary to the spirit and intent of the Bankruptcy Act. *In re West Texas Marketing*, 82 B.R. 829, 830-31 (S.D. Tex, 1988) (on remand).

7. The DOE claim is entitled to the same treatment in principal and interest as all other general unsecured claims, except that no amount may be paid to the DOE for post petition interest or for payment to state or federal treasuries if to do so would impair any of the general unsecured creditors with allowed claims or would otherwise constitute a preference of identifiable overcharge victims over the other unsecured creditors.

8. After payment to all identified overcharge victims within the DOE claim, and to all other general unsecured creditors of the debtor with allowed claims, that portion of the DOE claim which cannot be traced to victims, being instead payable to state or federal treasuries, shall be an allowed claim disbursable to the extent of available assets.

ORDER

Based upon the foregoing findings of fact and conclusions of law, and grounds therefore appearing,

IT IS ORDERED vacating this court's minute entry order of August 19, 1986.

IT IS FURTHER ORDERED allowing the claim of the DOE as a general unsecured claim in the amount of $20,353.46 as to the Harrison Lease, and $333,025.93 as to the Moore Well,

together with pre-petition interest in the amount of $18,772.28.

IT IS FURTHER ORDERED staying disbursement upon any allowed general unsecured claims except upon further order or as follows:

A) From the total funds available for distribution to allowed general unsecured claims, the pro rata share of the DOE claims should be sequestered, and the remainder may be distributed pro rata to the other allowed general unsecured claims.

B) Upon filing of a notice of determination by the DOE of the amount of restitution payable to an identified overcharge victim, the pro rata disbursement on such amount shall be made to the DOE for payment to such victim.

C) Any portion of the sequestered allowed claim of the DOE which cannot be disbursed to an overcharge victim so entitled shall be equitably disbursed pro rata amongst the identified overcharge victims and the other allowed general unsecured claims.

D) After all identified overcharge victims and all other general unsecured creditors with allowed claims have been paid in full and without impairment, disbursement shall be made to the DOE on the remaining balance of its claim.

IT IS FURTHER ORDERED allowing the DOE 180 days, and such additional time as may hereafter be granted for cause, to file notices of determinations as to the overcharge victims.

IT IS FURTHER ORDERED directing counsel for the DOE to lodge a form of judgment.

DATED this 23 day of January, 1989.

/s/Lawrence Ollason
LAWRENCE OLLASON
Bankruptcy Judge

Copy of the foregoing mailed this 24 day of January, 1989, to:

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LasVegas, Nevada, 89101

Arthur M. Weissbrodt, Esq.
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APPENDIX B

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

BK-LV-77-73

IN RE:
TRANSCONTINENTAL ENERGY CORPORATION,
Debtor.

RICHARD A. DAVIS, TRUSTEE,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF ENERGY,

Defendant.

MOTION FOR RECONSIDERATION

The United States Department of Energy ("DOE") respectfully moves this Court to reconsider its Findings of Fact and Conclusions of Law and Order ("Order") issued on January 23, 1989.[1] In particular, the DOE seeks reconsideration of the amount and the treatment of the DOE's allowed general unsecured claim. The Order presently is inconsistent with prevailing statutory and case law. In support of this Motion, the DOE states as follows:

1. The Order Should Be Revised To Allow The DOE's Full Claim for $507,697.06.

The ordering language, following the Court's Findings of Fact and Conclusions of Law, allows the claim of the DOE as a general unsecured claim in the amount of $20,353.46 as to the Harrison Lease and $333,025.93 as to the Moore Lease/Well, together with pre-petition interest in the amount of $18,772.28, for a total amount of $372,151.67. Order at 7. The Order makes no mention of the additional $135,540.39 which the DOE has claimed. This sum constitutes the interst on the $115.815.74, which this Court ordered Transcontinental Energy Corporation ("TEC") to deposit in an interest-bearing escrow account for the DOE on April 17, 1979. Order re

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[1]The language of the Order indicates that it is not final since it concludes by directing the DOE to lodge a form of judgment with this Court. Mr. Timothy Coker, Judge Ollason's law clerk, advised the DOE that the January 29, 1989 Order is not a final appealable order and that the DOE should postpone submitting a form of judgment until the Court resolves this Motion for Reconsideration.

Segregation of Alleged Overcharges on Sale of Crude Oil from the Moore Lease (April 17, 1979). The $115,815.74 is the amount of illegal overcharges which TEC received for crude oil sold from the Moore Lease after filing its bankruptcy petition. *See* Memorandum in Support of Department of Energy's Motion for Summary Judgment, filed November 25 1985, at 17, 18, 23; DOE's Reply in Support of its Motion for Summary Judgment and Opposition to Cross Motion for Summary Judgment, filed March 7, 1986, at 14; DOE's Proposed Findings of Fact and Conclusions of Law, filed November 1, 1988, at 3, 4, 9, 12.

Because the Order makes no mention of this additional $135,540.39 which the DOE has claimed, it is not clear whether this additional sum claimed was overlooked or denied and, if denied, what the basis of the denial was. Accordingly, the DOE moves this Court to allow the additional $135,540.39 which the DOE has claimed, thereby increasing the DOE's allowed general unsecured claim to $507.697.06.

2. No Distributions To Unsecured Creditors Should Be Made At This Time.

The Court's ordering language also provides that:

> From the total funds available for distribution to allowed general unsecured claims, the pro rata share of the DOE should be sequestered, and the remainder may be distributed pro rata to the other allowed general unsecured claims.

The DOE opposes any distributions to unsecured creditors until a final nonappealable order is issued regarding the amount, treatment and allowability of the DOE's claim *based upon the DOE's total claim of $507,697.06.* This is because, as discussed above, the DOE's claim is for $507,697.06, not for

$353,379.39, and, without such an order, the DOE's right to appeal will be prejudiced because depletion of the estate will make it impossible as a practical matter for the DOE to collect on its allowed claim. Further, if this Court allows a distribution to unsecured creditors at this time, all future administrative and priority expenses, which could be substantial, will be paid solely from the DOE's pro rata share. Such a result runs contrary to bankruptcy law, which requires that all such administrative expenses be shared equally by all unsecured creditors, including those creditors whose claims are uncontested.

Alternatively, if this Court believes that a partial distribution should be made, the DOE requests that the amount reserved prior to any such distribution be raised to cover (1) the DOE's pro rata share of all distributions to unsecured creditors based upon the full amount of the DOE's claim, *i.e.*, $507,697.06, and (2) sufficient monies to pay for all likely or possible priority and administrative and litigation expenses the estate may incur, including expenses to litigate the DOE's claim and/or any other claims, and trustee and counsel expenses.

3. DOE's Full Claim Must Be Treated On A Par With Other General Unsecured Claims Regardless Of Whether The DOE Provides Restitution To Injured Parties Directly Or Indirectly.

The ordering provisions requiring the DOE to identify injured parties, granting the DOE 180 days to do so, and providing that the DOE's claim will be subordinated to other general unsecured claims to the extent that the DOE cannot identify specific injured parties, should be eliminated because these provisions are inconsistent with prevailing law. The DOE

requests that the Order instead be revised to treat the DOE's claim on a par with other general unsecured claims regardless of whether the DOE is able to provide restitution directly by identifying specific injured parties or indirectly by a congressionally mandated form of indirect restitution.

Under precedent of the Temporary Emergency Court of Appeals ("TECA"), which has exclusive nationwide jurisdiction over the matter at issue here and is thus binding on this Court,[2] the DOE's full claim is a general unsecured claim and must be treated on a par with other unsecured claims, regardless of whether the DOE provides direct or indirect restitution to injured parties. *United States Department of Energy v. West Texas Marketing*, 763 F.2d 1411 (TECA 1985), *on remand*, 82 B.R. 829 (Bankr. N.D. Tex. 1988), *appeal docketed*, No. CA-1-88-85-W (N.D. Tex. February 29, 1988) ("WTM"). *Accord, Compton v. United States Department of Energy*, 90 B.R. 798 (N.D. Tex. 1988), *appeal dismissed* (5th Cir. January 30, 1989); *Department of Energy v. Gratex Corp.*, 66 B.R. 209 (N.D. Tex. 1986), *appeal dismissed* (5th Cir. December 6, 1988). On the one hand, this Court appropriately follows the TECA's decision by holding that the DOE's claim is an allowed general unsecured claim under the Bankruptcy Code (Order at 6, 7). On the other hand, the Order subordinates the DOE's claim, and thereby essentially treats the

---

[2]Section 211(b)(2) of the Economic Stabilization Act of 1970 ("ESA"), § 1904 note, as incorporated into Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. § 754(a)(1); *WTM, supra*, 763 F.2d at 1423-24. On January 30, 1989, the Fifth Circuit likewise found that the TECA has exclusive jurisdiction over this matter and dismissed Compton Corporation's appeal of the district court's decision in *Compton Corp. v. United States Department of Energy*, 90 B.R. 798 (N.D. Tex. 1988), *appeal docketed*, No. 88-1680 (5th Cir. September 12, 1988), for lack of subject matter jurisdiction. *See* The DOE's Motion to Dismiss Compton's appeal (Attachment A hereto) and the Fifth Circuit's Order dismissing the appeal (Attachment B).

DOE's claim as a penalty, to the extent that the DOE provides indirect restitution to those persons injured by TEC's overcharges (such as payments to the states for use in energy programs or to the federal treasury), as opposed to direct restitution to identified overcharge victims (Order at 6-8). This conflicts with the TECA decision in *WTM* and is internally inconsistent. Indeed, it is in direct conflict with the express holding of the TECA in *WTM* that "the effectiveness of DOE in distributing funds collected to the actual parties who were overcharged cannot change the restitutionary character of the DOE's claim." *WTM, supra*, 763 F.2d at 1426; *accord, Compton Corp. v. United States, supra*, 90 B.R. at 801-02; *see, In re O'Connor*, 67 B.R. 538 (Bankr. W.D.Okla. 1986).

There is no valid basis stated in this Court's order for subordinating any portion of the DOE's claim. The Order is not based on and does not reference any provision of the Bankruptcy Act or the Bankruptcy Code. Rather, the Order merely relies upon the decision of the Texas bankruptcy court on remand in the *WTM* case, 82 B.R. 829 (N.D. Tex. 1988). The DOE respectfully submits that the bankruptcy court's decision on remand in *WTM* is erroneous, and the DOE as appealed this decision to the Northern District of Texas, *appeal docketed* No. CA-1-88-85-W (N.D. Tex. February 29, 1988). Importantly, the district court before which the *WTM* appeal is pending, the district court for the Northern District of Texas, recently decided the *Compton* case in the DOE's favor, and expressly rejected in *Compton*, the argument that the DOE's claim should be subordinated to the claims of general unsecured creditors to the extent the DOE does not identify the parties harmed by the illegal overcharges. The district court, after holding that it was bound to follow the TECA's decision in *WTM*, stated:

> Finally, and perhaps most significantly, the TECA expressly vitiated Appellee's alternative argument

> herein that the DOE's claim can be for restitution only to the extent that it can identify and reimburse the parties or entities actually injured as a result of Compton's illegal overcharges.

90 B.R. at 801-02. Reliance by this Court on the bankruptcy court's decision on remand in *WTM* is, thus, misplaced.

Since the TECA's decision in *WTM* is binding precedent due to the TECA's exclusive jurisdiction over this matter, this Court's Order must comply with the TECA's decision in *WTM*. The TECA in *WTM*, expressly rejected the treatment which has been accorded the DOE in this Court's Order, and accordingly all the subordination provisions in this Court's Order should be deleted.

The subordination of the DOE's claim to the extent that the DOE does not identify specific overcharge victims, also is contrary to the provisions of the Petroleum Overcharge Distribution and Restitution Act of 1986 ("PODRA"). 15 U.S.C. §§ 4501, *et seq*. The PODRA expressly requires that overcharge funds be distributed in varying proportions to identified overcharge victims, as well as to the states and federal treasury. 15 U.S.C. §§ 4501, 4502, *see* discussion *infra* at 11-14. Pursuant to Sections 4502 and 4503 of the PODRA, all such distributions, including those to the states and federal treasury, are for ***restitution***, whether direct or indirect. Consequently, to treat the DOE's claim as a penslty by subordinating the claim to the extent that the DOE does not identify specific overcharge victims, is in clear conflict with Congress' intention and express statements that such portions of DOE claims are for restitution.

The deletion of all subordination provisions in the Order is also consistent with established law that a government agency may file a claim in bankruptcy to enforce a statutory obliga-

tion in the public interest, regardless of whether the agency identifies specific injured parties or claims the monies for its own account. In *Ohio v. Kovacs*, 469 U.S. 274 (1985), the Supreme Court found that the state of Ohio's claim for hazardous waste cleanup costs to compensate the state for injury to wildlife, was a proper claim in bankruptcy. *See also In re Evans Products Co.*, 60 B.R. 863, 867-68 (S.D. Fla. 1986) (Federal Trade Commission's consumer fraud claim for restitution to seek to enforce statutory obligation in the public interest, filed by the FTC in its own right, was a proper claim in bankruptcy). Hence, the indirect restitution of illegal overcharges to customers injured nationwide via a distribution to state and federal governments, is recognized as valid, and not prohibited under bankruptcy law.[3]

Finally, the Order should be revised to pay all nonsubordinated funds to DOE and to eliminate (1) the requirement that the DOE identify injured parties before the DOE receives any recovery from the TEC estate, and (2) the provisions granting the DOE 180 days to do so. These provisions of the Order are in conflict with the PODRA, including the identification and

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[3]By ordering the DOE to identify injured consumers, this Court's Order also erroneously, in effect, treats the DOE's claim as a class claim made on behalf of all potential private claimants notwithstanding their independent right to make such claims, *i.e.*, as a class claim under Section 210 of the ESA; and requires the DOE, as the class representative, to identify the individual members of the class it represents. However, the DOE did not file a class action. The DOE filed its claim in its own right for restitution under the ESA Section 209. The DOE has no statutory authority to file a Section 210 claim, class or otherwise. Throughout DOE's regulatory program, public enforcement proceedings under Section 209 have been separate and distinct from private damage claims under Section 210. *Payne 22, Inc. v. United States*, 762 F.2d 91, 93 (TECA 1985); *Cities Service Co. v. DOE*, 715 F.2d 572, 574 (TECA 1983). The DOE's claim under Section 209 is, thus, a claim by a government agency, filed in its own right, to enforce a statutory obligation in the public interest, and not a class claim.

refund distribution procedures which the PODRA requires the DOE and all courts, including this Court, to follow.

The PODRA, which was enacted to supplement the restitutionary authorities of the EPAA and ESA, requires that, with certain exceptions not applicable here, all overcharge monies, including interest thereon, no matter how collected, are subject to the PODRA and are to be placed in escrow account administered for the DOE by the Secretary of the Treasury. 15 U.S.C. § 4501.[4] After the monies are placed in such escrow accounts, the DOE is to commence identification procedures in accordance with 10 C.F.R. Part 205, Subpart V and all refund distributions are to be made from such escrow accounts. 15 U.S.C. § 4502(b).[5] The PODRA requires that

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[4]Section 4501(a) provides, in pertinent part:

This subtitle

> (1) specifies the procedure for the disbursement of funds collected, including interest thereon, by the Secretary [of Energy] or the courts pursuant to the Emergency Petroleum Allocation Act of 1973 or the Economic Stabilization Act of 1970 (and the regulations issued thereunder) as restitution for actual or alleged violation of such acts or regulations and
>
> 2 . . . applies to . . .
>
> (B) any amount of such funds determined at any time, pursuant to judicial or administrative proceedings (including any settlement agreement or declaratory judgment) instituted by the Secretary to enforce such Acts and regulations, to be amounts paid for such actual or alleged violations, including any such amounts held in escrow by any court.

Section 4501(d) provides that the "amounts covered by subsection (a) shall be held in appropriate escrow accounts administered for the Secretary by the Secretary of Treasury."

[5]Section 4502(b) provides in pertinent part:

> (b) Disbursement of restitutionary amounts as direct restitution to injured persons
>
> (1) The Secretary shall, through the Office of Hearings and Appeals of the Department of Energy, conduct proceedings

all the DOE's actions and all court actions conform to these procedures. 15 U.S.C. § 4502(a)(1).[6] Accordingly, pursuant to PODRA the DOE is to begin its identification procedures after it has received the overcharge monies; and the provisions of the Order directing the DOE to do otherwise, are in violation of the PODRA.

The PODRA also has adopted the "Stripper Well Settlement Agreement" (Attachment C), and in accordance therewith mandates the amounts of the overcharge funds which are to be paid as direct restitution to specific injured parties and the amounts to be paid as indirect restitution to the states for energy-related programs and to the federal treasury. 15 U.S.C. §§ 4501-03.

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expeditiously in accordance with subpart V regulations for the purpose of, to the maximum extent possible —

(A) identifying persons or classes of persons injured by any actual or alleged violation of the petroleum pricing and allocation regulations issued pursuant to the Emergency Petroleum Allocation Act of 1973 or the Economic Stabilization Act of 1970;

(B) establishing the amount of any injury incurred by such persons; and

(C) making restitution, through the disbursement of amounts in the escrow accounts described in subsections (b) [*i.e.*, escrow accounts prior to the enactment of the PODRA] and (d) of section 3002 [15 U.S.C. § 4501] to such persons.

[6]Section 4502(a)(1) provides, in pertinent part:

(A) all rulings policies, or other statements (including any administrative order or settlement agreement) issued after the date of the enactment of this Act by any office, official, or employee of the Department of Energy; and

(B) all orders, including declaratory judgments, issued by any court after the date of the enactment of this Act, shall be consistent with the provisions of this subtitle.

On July 7, 1986, the district court in *In re: The Department of Energy Stripper Well Litigation*, M.D.L. 378 (D. Kan.), 690 F.2d 1375, *cert. denied*, 459 U.S. 1127 (1983), approved what has become known as the Stripper Well Settlement Agreement. The Stripper Well Settlement Agreement was the result of extensive negotiations between numerous public and private interests to determine the disposition of the crude oil overcharge funds in the *Stripper Well* case. The scope of the settlement agreement is extremely broad: it covers all applicants for restitution for crude oil overcharges, including those who elect to receive payment directly from the Stripper Well settlement escrow funds as well as all other potential applicants for restitution for crude oil overcharges who seek payment from funds collected by the DOE in other crude oil cases, such as the present case.

For persons who elect to receive payment directly from the Stripper Well settlement escrow funds, such payment is in full settlement of any claim such persons may have in any case for crude oil overcharges. Such persons are required to sign a waiver releasing any claims they may have against all other crude oil overcharge funds. Stripp Well Settlement Agreement, III.A. (Attachment C at 10). Participants who have elected to receive such payments and who have thereby waived all other rights to restitution, include all refiners, most resellers of refined petroleum products, as well as some retailers of gasoline and diesel fuel, agricultural cooperatives, domestic airlines, investor-owned utilities, surface transporters, and rail and water transporters.

Under the Stripper Well Settlement Agreement, crude oil overcharges in excess of $400 million have already been distributed as restitution to firms at various levels of the domestic petroleum industry, and more than $100 million so far has been distributed to industrial transportation and agricultural end-users such as airines and co-ops. Thus, many

potential recipients of crude oil overcharge monies have been paid and waived any rights they may have had against future crude oil overcharge funds, such as the funds to be received from TEC.

The settlement also provided a mechanism for other potential claimants who did not elect to receive payment from the Stripper Well escrow funds, to file for a refund for crude oil overcharges. Under this mechanism, these claimants are allowed to submit refund claims under 10 C.F.R. Part 205, Subpart V, and they will be paid from funds collected by the DOE in crude oil cases other that the *Stripper Well* case, such as the present case. The DOE is required to establish an initial reserve fund for these claims up to 20% of all such crude oil overcharge funds. The remaining 80% of such funds are to be divided equally between the state and federal governments for the energy-consuming public. Stripper Well Settlement Agreement, IV.B 2, 3, 6 (Attachment C at 13-15). The mechanism for direct restitution to persons claiming injury from the crude oil overcharges at issue in the *Stripper Well* case is thus permanently coordinated on a nationwide basis and integral to the mechanism for refunds for restitution under Subpart V in other cases, including this case.

The DOE first implemented the Stripper Well Settlement Agreement in its Modified Statement of Restitutionary Policy for Crude Oil Cases, 51 Fed. Reg. 27899 (August 4, 1986) ("MSRP"). *See* Attachment D, "Notice Explaining Procedures for Processing Refund Applications in Crude Oil Refund Proceedings Under 10 C.F.R. Part 205, Subpart V," 52 Fed. Reg. 11737 (April 10, 1987), which describes the MSRP. Subsequently, Congress, in late 1986, adopted legislatively in the PODRA this comprehensive, nationwide plan for direct *and indirect* restitution for crude oil overcharges that Subpart V, the Stripper Well Settlement Agreement and the DOE's MSRP all required.

In sum, the statutory scheme for restitution of crude oil overcharges is a complex scheme coordinated and integrated with a massive settlement agreement which is designed to achieve restitution most effectively, by both direct and indirect means. This coordinated scheme would be thwarted if courts were allowed to impose varying identification and reimbursement procedures on the DOE. The DOE as well as this Court have, thus, been statutorily bound under the PODRA to follow the identification and distribution procedures set forth in the PODRA. Accordingly, the DOE requests this Court to eliminate the 180 day identification provisions of the Order since they contravene the PODRA.

WHEREFORE, the DOE moves this Court to reconsider its Order of January 23, 1989, and allow the DOE's claim as a general unsecured claim in the amount of $507,697.06, to be treated on a par in its entirety, with all other allowed general unsecured claims.

Respectfully submitted

/s/ Diane Polinger

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 14th day of February 1989, the Department of Energy's Motion for Reconsideration was served by Federal Express Mail upon the following:

Timothy S. Cory, Esquire
515 South Third Street
Las Vegas, Nevada 89101

/s/ Diane Polinger

APPENDIX C

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Attorneys for the Trustee/Appellee

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

In re:	)	
	)	
TRANSCONTINENTAL ENERGY	)	CIVIL NO.
CORPORATION, a Nevada	)	S-89-160-RDF
corporation, f/k/a OIL	)	BK-S-77-730-LO
PRODUCERS & REFINERS, INC.	)	
f/k/a TRANSCONTINENTAL	)	
POWER COMPANY,	)	
	)	
Bankrupt.	)	
	)	
	)	
MARGARET ROUSE, Executrix of	)	
the Estate of GAYLOR ROUSE,	)	
Decedent,	)	
	)	
Appellant,	)	

vs.

RICHARD A. DAVIS,

Appellee.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO APPELLANT'S MOTION FOR RECONSIDERATION OF THIS COURT'S ORDER DENYING APPELLANT'S LEAVE TO APPEAL, OR, ALTERNATIVELY, FOR CERTIFICATION OF APPEAL TO NINTH CIRCUIT COURT OF APPEALS

I.

INTRODUCTORY STATEMENT

The Trustee, Richard A. Davis, Appellee, and hereby opposes Appellant's Motion for Reconsideration or Alternatively for Certification of Appeal to Ninth Circuit Court of Appeals in that an immediate appeal would not materially advance the ultimate termination of the litigation.

II.

BACKGROUND

On March 8, 1989, this Court denied Appellant's Motion to District Court for Leave to Appeal filed on February 28, 1989. The Trustee filed his opposition to Appellant's Motion to District Court for leave to Appeal on February 28, 1989.

On February 1, 1989, the Bankruptcy Court's Order of January 24, 1989, was docketed with the Clerk of the

Bankruptcy Court. This Order granted the Trustee's motion to amend and supplement the complaint. The Order rejected the first, second and third claims for relief of the proposed amended complaint because the Court found that they had been pursued to final judgment. However, the fourth claim for relief of the proposed amended complaint was allowed with instructions. The proposed supplemental complaint's first claim for relief was also rejected. It had also been included as the fifth claim for relief of the proposed amended complaint. Appellant sought to defeat the Trustee's secured claim for relief in the proposed supplemental complaint, which was also included as the sixth claim for relief of the proposed amended complaint, but that Motion was denied. Therefore, there remain two claims for relief to be tried before the bankruptcy Court.

Appellant is now once again before the District Court seeking reconsideration of its March 8, 1989 Order.

III.

ARGUMENT

An order "which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken to enable the Court to adjudicate the cause on the merits," is considered interlocutory. *In re Merle's Inc.*, 481 F.2d 1016 (9th Cir. 1973).

The Bankruptcy Court's February 1, 1989 Order retained the Trustee's fourth claim for relief based on breach of fiduciary duty against the Appellant thereby not adjudicating all the claims and rights of all parties.

28 U.S.C. Section 1292(b) governs discretionary appeals from the district courts to the courts of appeals. This statute provides in pertinent part:

> "(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involved a controlling question of law as to which there is substantial ground for a difference of opinion and that an intermediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order . . ."

A number of courts have recognized that 28 U.S.C. Section 1292(b), which provides the standard for such appeals from district courts' interlocutory orders, applies to appeals from bankruptcy courts. *In re Bertoli*, 58 B.R. 992 (D.N.J. 1986); *In re Johns-Manville Corporation*, 39 B.R. 234, 236 (citing *In re Codesco, Inc.*, 30 B.R. 472, 473 (S.D.N.Y. 1983)); *In re Moskowitz*, 14 B.R. 307, 308 (S.D.N.Y. 1981).

The Trustee's fourth and sixth claims for relief have not been decided by trial on the merits, and, therefore, appellant review should be postponed until after the entry of final judgment. Only exceptional circumstances justify the hearing of an appeal before a final judgment is rendered. *Coopers and Lybrand v. Livesay*, 437 U.S. 463, 475, (1978). The present motion does not satisfy the requirement for exceptional circumstances.

Interlocutory appeals are allowed when three requirements are satisfied:

> (1) A controlling question of law is involved;
>
> (2) The question is one where there is substantial ground for difference of opinion; and
>
> (3) An immediate appeal would materially advance the ultimate termination of the litigation.

28 U.S.C. Section 1292(b).

Appellant's appeal would not ultimately advance the termination of the bankruptcy proceedings.

In the instant case, no final judgment has been entered adjudicating all the claims and rights of all parties. *In re Ahearn*, 78 B.R. 24 (Bkrtcy. S.D.N.Y. 1987). Therefore, the Order of the Bankruptcy Judge is not appealable. *Central Ill. Sav. & Loan v. Rittenberg Co. Ltd.*, 85 B.R. 473 (N.D. Ill. 1988).

IV

CONCLUSION

For the above-stated reasons Appellant's Motion for Reconsideration should be denied as interlocutory and not ripe for appeal.

DATED this 10th day of April, 1989.

PATRICK C. CLARY, CHARTERED

By /s/ Patrick C. Clary
PATRICK C. CLARY, ESQ.

CORY & BOYCE

By /s/ Timothy S. Cory
TIMOTHY S. CORY, ESQ.
Attorneys for Trustee/Appellee

CERTIFICATE OF SERVICE BY MAIL

The above and foregoing MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO APPELLANT'S MOTION FOR RECONSIDERATION OF THIS COURT'S ORDER DENYING APPELLANT'S LEAVE TO APPEAL OR, ALTERNATIVELY, FOR CERTIFICATION OF APPEAL TO NINTH CIRCUIT COURT OF APPEALS was served on Appellant by mailing copies thereof, first-class postage prepaid, to her attorneys, ROGER WESLEY, ESQ., 1050 Connecticut Avenue, NW, Suite 1200, Washington, D.C. 20036 and RICHARD MCKNIGHT, ESQ., 330 S. Third Street, Las Vegas, Nevada 89101 on the 10th day of April, 1989.

PATRICK C. CLARY, CHARTERED

By Patrick C. Lary
PATRICK C. CLARY
Attorneys for Trustee/Appellee

APPENDIX D

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

Chapter 11
BK-LV-77-730

IN RE:
TRANSCONTINENTAL ENERGY CORPORATION,
Debtor.

RICHARD A. DAVIS, TRUSTEE,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF ENERGY,
Defendant.

MINUTE ENTRY ORDER

The Department of Energy's ("DOE") motion for reconsideration came on regularly for hearing in Las Vegas, Nevada, on April 24, 1989, and was taken under advisement. The court having considered the briefs and arguments of counsel, and it having been the intent of the court to exclude post-petition interest as a part of the allowed unsecured claim, and to preserve the issues for consideration on appeal,

IT IS ORDERED that DOE's motion for reconsideration is denied.

IT IS FURTHER ORDERED that the Trustee is to make no distributions except upon further order or upon stipulation with the DOE.

IT IS FURTHER ORDERED vacating this court's prior order setting a deadline for the DOE to identify overcharge victims.

IT IS FURTHER ORDERED that this is final order commencing the time for appeal of this court's findings of fact and conclusions of law.

DATED AT TUCSON, ARIZONA, this 19 day of June, 1989.

LAWRENCE OLLASON

LAWRENCE OLLASON
UNITED STATES BANKRUPTCY JUDGE

Copy of the foregoing mailed this 20th day of June, 1989, to:

Patrick Clary, Esq.
415 South 6th Street
Suite 200
Las Vegas, Nevada 89101

Timothy S. Cory, Esq.
515 S. 3rd Street
Las Vegas, Nevada, 89101

William A. Maddox, Esq.
Ruth L. Cohen, Esq.
United States Attorney's Office
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Arthur M. Weissbrodt, Esq.
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APPENDIX E

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Attorneys for United States of America

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

IN RE:	)
	)
TRANSCONTINENTAL ENERGY	)
CORPORATION,	)
Debtor.	)
	)

RICHARD A. DAVIS, Trustee, Transcontinental Energy Corporation Plaintiff, v. UNITED STATES DEPARTMENT OF ENERGY, Defendant.	)	BK-LV-77-730

NOTICE OF APPEAL

DEFENDANT, United States Department of Energy ("DOE"), hereby appeals to the United States District Court for the District of Nevada from the Order of the Bankruptcy Court entered in this contested matter on June 19, 1989. This Order incorporated in part and modified in part the Bankruptcy Court's non-final "Findings of Fact and Conclusions of Law," dated January 23, 1989. The June 19, 1989 Order, *inter alia,* grants DOE an allowed general unsecured claim in the amount of $20,353.46 as to the Harrison Well/Leases, and $333,025.93 as to the Moore Well/Lease, together with pre-petition interest in the amount of $18,772.28. However, the Order, in effect, subordinates DOE's claim to the claims of other general unsecured creditors to the extent that DOE does not identify specific overcharged individuals. The Order also denies DOE post-petition interest on funds subject to a Court-ordered escrow. Parties to the Order appealed from and the names and addresses of their respective attorneys are as follows:

Richard A. Davis, Trustee for Transcontinental Energy Corporation

Timothy S. Cory, Esq.
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Las Vegas, Nevada 89101

United States Department of Energy

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United States Attorney

William A. Maddox, Esq.
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330 S. 3rd Street
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Las Vegas, Nevada 89101

Certain Other Creditor(s) Including

Patrick Clary, Esq.
415 South 6th Street
Suite 200
Las Vegas, Nevada 89101

Respectfully submitted

Dated: June 27, 1989 /s/ Diane Polinger

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DIANE POLINGER, ESQ.
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 27th day of June, 1989, copies of the Department of Energy's Notice of Appeal were served by Federal Express Mail upon the following:

Timothy S. Cory, Esq.
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Las Vegas, Nevada 89101

Patrick Clary, Esq.
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Las Vegas, Nevada 89101

/s/ Diane Polinger

APPENDIX E

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Telephone: (702) 388-6336
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Attorneys for United States of America

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

IN RE:	)
	)
TRANSCONTINENTAL ENERGY	)
CORPORATION,	)
Debtor.	)
	)

RICHARD A. DAVIS, Trustee, Transcontinental Energy	)	BK-LV-77-730
v.	)	
UNITED STATES DEPARTMENT OF ENERGY.	)	
Defendant.	)	

NOTICE OF APPEAL

DEFENDANT, United States Department of Energy ("DOE"), hereby appeals to the United States District Court for the District of Nevada from the Order of the Bankruptcy Court entered in this contested matter on June 19, 1989. This Order incorporated in part and modified in part the Bankruptcy Court's non-final "Findings of Fact and Conclusions of Law," dated January 23, 1989. The June 19, 1989 Order, *inter alia*, grants DOE an allowed general unsecured claim in the amount of $20,353.46 as to the Harrison Well/Leases, and $333,025.93 as to the Moore Well/Lease, together with pre-petition interest in the amount of $18,772.28. However, the Order, in effect, subordinates DOE's claim to the claims of other general unsecured creditors to the extent that DOE does not identify specific overcharged individuals. The Order also denies DOE post-petition interest on funds subject to a Court-ordered escrow. Parties to the Order appealed from and the names and addresses of their respective attorneys are as follows:

Richard A. Davis, Trustee for Transcontinental Energy Corporation

Timothy S. Cory, Esq.
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Las Vegas, Nevada 89101

United States Department of Energy

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Certain Other Creditor(s) Including

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Respectfully submitted

Dated: June 27, 1989 /s/ Diane Polinger

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 27th day of June, 1989, copies of the Department of Energy's Notice of Appeal were served by Federal Express Mail upon the following:

Timotny S. Cory, Esq.
515 S. Third Street
Las Vegas, Neada 89101

Patrick Clary, Esq.
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Las Vegas, Nevada 89101

/s/ Diane Polinger

APPENDIX F

RECEIVED
AUG 17 '90
By efm
Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-89-840-PMP (LRL)
BK-S-77-730-LO

ENTERED
AUG 20 1990
CLERK,
U.S. DISTRICT
COURT DISTRICT
OF NEVADA
BY efm, DEPUTY

IN RE:
TRANSCONTINENTAL ENERGY CORPORATION,
Debtor.

v.

UNITED STATES DEPARTMENT OF ENERGY,
Appellant,

v.

RICHARD A. DAVIS, TRUSTEE,
Appellee.

OPINION

This is an appeal from a Final Order entered by the Bankruptcy Court on June 22, 1989, which denied Appellant's Motion for Reconsideration of the Bankruptcy Court's Findings of Fact and Conclusions of Law entered January 27, 1989, This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 158(a).

FACTUAL BACKGROUND

The underlying action arose from the bankruptcy proceedings relating to Debtor Transcontinental Energy Corporatin (hereinafter "Transcontinental"), initiated on October 14, 1977. On October 5, 1978, Transcontinental was adjudicated bankrupt and a Trustee, Robert N. Broadbent, was

appointed. In March 1981, Appellee, Richard A. Davis, succeeded Broadbent as Trustee.

On April 4, 1979, Appellant, United States Department of Energy (hereinafter "DOE") filed a Proof of Claim. Appellant filed an Amended Proof of Claim on October 22, 1985, predicated on the following:

(1) a Notice of Probable Violation, dated March 30, 1979, issued by the DOE to Transcontinental pursuant to Section 209[1] of the Economic Stabilization Act of 1970 (hereinafter "ESA"), 12 U.S.C. § 1904 note, as incorporated into section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 (Hereinafter "EPAA"), 15 U.S.C. § 754(a)(1), which alleged that Transcontinental unlawfully overcharged from the sale of crude oil on two Transcontinental-owned properties, the Harrison Lease and the Moore Well; and

(2) continuing violations of Section 209 by Transcontinental with respect to the Moore Well.

The DOE seeks restitution fo $372,151.67, which consists of the illegal overcharges plus pre-petition interest.[2]

On December 4, 1980, the Trustee filed an objection to the DOE's claim. On November 25, 1985, the DOE filed a Motion for Summary Judgment and the Trustee filed a Cross-Motion for Summary Judgment on January 31, 1986. At issue

---

[1]Section 209 authorizes the DOE to seek restitution of illegal overcharges.

[2]The illegal overcharges can be broken down as follows:

(1) $20,353.46 for overcharges from the Harrison Lease Property from January 1975 through December 1975; and

(2) $333,025.93 for overcharges from the Moore Well property, dating from March 1975 through December 1980.

The pre-petition interest totals $18,772.28.

were the merits of the DOE's claim as well as whether the DOE's claim should be characterized as restitutionary or as a penalty. If the claim were termed a penalty, then the claim would be disallowed pursuant to Section 57(j) of the Bankruptcy Act.

On August 25, 1986, the bankruptcy court issued a Minute Entry and Order granting the Motion for Summary Judgment in favor of the Trustee and further ordered the Trustee to prepare the judgment. However, the bankruptcy court reconsidered its Minute Entry and Order following the reversal of *In re Compton Corp.*, 40 B.R. 880 (N.D.Tex. 1984). *See In Compton Corp.*, 90 B.R. 798 (N.D.Tex. 1988). Upon rehearing the matter on November 7, 1988, the Trustee confined his objections to the restitution/penalty issue.

On January 27, 1989, the bankruptcy court issued Findings of Fact and Conclusions of Law at pages 6-7 which found in pertinent part:

> 3. The DOE's claim is a claim for restitution which may not be disallowed as a penalty, but which is nevertheless subject to the Bankruptcy Act. *United States v. West Texas Marketing Corp.*, 763 F.2d 1411, 1426 (TECA, 1985).
>
> 4. The DOE's claim for restitution is a general unsecured claim; however, any portion thereof which cannot be returned to an overcharge victim is payable to the treasuries of state and federal governments. 51 F.R. 27899 (August 4, 19 86).
>
> 5. The Bankruptcy Act mandates that available funds be distributed to creditors with identifiable claims.

---

[3]The Trustee had relied upon *In re Compton Corp.*, 40 B.R. 880 (N.D. Tex. 1984) in arguing that the DOE's claim constituted a penalty.

In re West Texas Marketing, 82 B.R. 829, 830-31 (S.D. Tex. 1988) (on remand).

* * *

7. The Doe Claim is entitled to the same treatment in principal and interest as all other general unsecured claims, except that no amount may be paid to the DOE for post petition interest or for payment to state or federal treasuries if to do so would impair any of the general unsecured creditors with allowed claims or would otherwise constitute a preference of identifiable overcharge victims over the other unsecured creditors.

8. After payment to all identified overcharge victims within the DOE claim, and to all other general unsecured creditors of the debtor with allowed claims, that portion of the DOE claim which cannot be traced to victims, being instead payable to state or federal treasuries, shall be an allowed claim disbursable to the extent of available assets.

Findings of Fact and Conclusions of Law, Docket #14.

The DOE moved the bankruptcy court to reconsider its Findings regarding the subordination of the DOE's claim. On June 22, 1989, the bankruptcy court issued an Order denying the DOE's motion for Reconsideration with respect to the subordination of the DOE's claim, and the DOE appealed. The Appeal was fully briefed and submitted to the Court for decision on March 26, 1990.

DISCUSION

The issue presented to this Court is whether the bankruptcy court erred in treating the DOE's claim as a penalty to the extent the DOE does not identify specific overcharge victims

under applicable pricing laws. This Court must also determine whether the case of *Department of Energy v. West Texas Marketing*, 763 F.2d 1411 (TECA 1985) is controlling.

The bankruptcy court's Findings of Fact and Conclusions of Law must be reviewed by the clearly erroneous and de novo standards respectively. *In re Daniels—Head & Associates*, 819 F.2d 914 (9th Cir. 1987).

Appellant argues that the bankruptcy court erred in treating the DOE's claim as a penalty to the extent the DOE does not identify specific overcharge victims. Specifically, Appellant claims that the bankruptcy court, though correctly relying upon *West Texas Marketing*, 763 F.2d 1411, in findng that the DOE's claim was for restitution and not for a penalty, incorrectly followed *In re West Texas Marketing Corp.*, 82 BR 829 (N.D.Tex. 1988) in subordinating the DOE's claim to all other allowed general unsecured claims to the extent that the DOE fails to specifically identify the overcharge victims.

Instead, Appellant submits that given the Temporary Emergency Court of Appeals' exclusive appellate jurisdiction to construe ESA and EPAA regulations, this Court is bound by the Temporary Emergency Court of Appeals' decision in *West Texas Marketing*. Appellant contends that consistent application of the restitution principle enunciated in *West Texas Marketing* is evidenced in *In re Compton Corp.*, 90 B.R. 798 (N.D.Tex. 1988). There, the court reversed the bankruptcy court's subordination of the DOE's claim to the fourth priority, as a penalty, to the extent that the DOE was unable to identify specific overcharge victims.

Citing *West Texas Marketing*, the Court noted:

> Finally, and perhaps most significantly, the TECA expressly vitiated Appellee's alternative argument herein that the DOE's claim can be for restitution

> only to the extent that it can identify and reimburse the parties or entities actually injured as a result of Compton's illegal overcharges. "WTM's [West Texas Marketing's] opinion as to the effectiveness of [the] DOE in distributing funds collected to the actual parties who were overcharged *cannot change the restitutionary character of [the] DOE's claim.*" *Id.* . . . In light of the foregoing, the Court is of the opinion that the Bankruptcy Court's relegation of the DOE's claim to the fourth priority must be reversed.

In re Compton, 90 B.R. at 802-803 (emphasis added).

Appellee responds that *West Texas Marketing* does not control the issue before this Court. Appellee argues that the decision in *West Texas Marketing* was not final pursuant to 28 U.S.C. § 158(d)[4] and that it was not a collateral order exception under 28 U.S.C. § 1291.[5] Title 28, U.S.C. § 1291 states:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States

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[4]Title 28 U.S.C. § 158(d) provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders and decrees entered under subsections (a) and (b) of this section.

[5]Appellee notes that in the original memorandum decision in *West Texas Marketing*, Judge Sear determined that the bankruptcy order from which the DOE appealed was neither final within the meaning of 28 U.S.C. § 158(d) nor qualified as a collateral order exception under 28 U.S.C. § 1291. *West Texas Marketing*, 763 F.2d at 1417. Accordingly, Appellee notes that the original memorandum decision did not address the correctness of the bankruptcy court's decision regarding the subordination of the DOE's claim "or any issues relating to the Temporary Emergency Court of Appeal's (hereinafter "TECA") subject matter jurisdiction to hear the appeal."

> District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in section 1292(c) and (d) and 1295 of this title.

Moreover, Appellee argues that the concurring opinions of Judges Christensen and Estes are mere dicta with respect to the subject matter jurisdiction of the Temporary Emergency Court of Appeals. Appellee argues that such dicta constitutes insufficient judicial precedent for *stare decisis* to be applicable to the instant controversy. Further, Appellee contends that the respective concurring opinions are "not dispositive of the issue regarding the subordination of the issue regarding the subordination of the DOE's claim."

The Court rejects Appelle's initial arguments pertaining to the controlling influence of *West Texas Marketing*. Upon rehearing, the Temporary Emergency Court of Appeals determined that the issue of the subordination of the DOE's claim was in fact appealable under the collateral order doctrine. *West Texas Marketing*, 763 F.2d at 1425.[6]

---

[6]The court in *West Texas Marketing* explained the basis underlying the court's finding of jurisdiction:

> In its petition for rehearing, DOE presented information which leads us to the conclusion that unless this court decides the issue of the subordination of DOE's claim, the amount of that claim will never be finally determined and the DOE will have no real opportunity to pursue this matter on appeal. This allows us to decide the merits of this appeal under the collateral order doctrine developed in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed.2d 1528 (1949).

West Texas Marketing, 763 F.2d at 1425.

Further, both the Temporary Emergency Court of Appeals in *West Texas Marketing* and the court in *In re Compton Corp*, have held that the Temporary Emergency Court of Appeals has exclusive appellate jurisdiction to decide issues arising under the ESA and/or the EPAA.[7] *See, West Texas Marketing*, 763 F.2d at 1420-24, 1426; *In re Compton*, 90 B.R. at 801, n. 9. Therefore, since the instant controversy concerns Section 209 of the ESA and in light of the jurisdictional holdings in *West Texas Marketing*, the Court finds that Appellee's initial opposition is without merit.

Appellee next contends that *West Texas Marketing* is inapplicable to the instant controversy since the Court intepreted 11 U.S.C. § 726(a)(4)[8], a provision different from that at issue in this case. Given that Debtor Transcontinental's action was filed under Chapter 11 of the Bankruptcy Act of 1898, Appellee argues that the instant case should be construed in accordance with the case law interpreting Section 57(j)[9],

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[7]The Court need not decide the merits of Appellant's argument that this Court is bound, by virtue of the doctrine of *stare decisis*, by the decision in *West Texas Marketing*. Instead, this Court can effectively decide the merits of the instant appeal independent of such analysis. Moreover, the Court disagrees with Appellee's assertion that the concurring opinions of Judges Christensen and Estes, with respect to the issue of subject matter jurisdiction, are mere dicta.

[8]Title 11 U.S.C. § 726(a)(4) provides:

> (a) except as provided in section 510 of this title, property of the estate shall be distributed —
>
> * * *
>
> (4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim;

[9]Section 57(j) of the Bankruptcy Act provided:

> Debts owing to the United States or to any States or any sub-

which requires "'pecuniary loss' in order to avoid disallowance of a claim as a penalty.

Section 726(a)(4) is the successor penalty provision to §57(j). As both parties acknowledge, the two sections are substantially identical as they pertain to the issue of whether DOE's claim should be construed as a penalty to the extent the DOE is unable to identify specific overcharge victims. The distinguishing feature between the two provisions is that under § 57(j) penalty claims are disallowed, whereas under § 726(a)(4) such claims are subordinated. In light of the similarity and successive nature of the provisions, the Court finds that § 209, the submitted basis for the DOE's claim, must be construed in the same manner under either section. Therefore, when determining whether the DOE's claim is restitutionary or is a penalty, the distinction between § 57(j) and § 726(a)(4) is meaningless.

Appellee's remaining arguments pertain to the merits of the decision in *West Texas Marketing*. Appellee contends that the decision is not based on any case authority; that the court looked only to the form, not the substance, of the DOE's claim; that the DOE's claim is for a penalty rather than for restitution given that the indirect compensation to be received by the DOE violates the policy of the bankruptcy laws to distribute available funds to those creditors with actual identifiable losses; that this policy was ignored by the court; and that the court ignored relevant case authority pertaining to Section 57(j).

The Court rejects Appellee's arguments and finds that the findings enunciated in *West Texas Marketing* control the instant controversy. The Temporary Emergency Court of Ap-

---

division thereof as a penalty or forfeiture shall not be allowed, except for the amount of pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose . . .

peals has exclusive appellate jurisdiction to construe ESA and EPAA provisions. In *West Texas Marketing*, the court, relying on the plain language of Section 209, held that the DOE's claim was for restitution and did not constitute a penalty. *West Texas Marketing*, 763 F.2d at 1426.

As in *West Texas Marketing*, the DOE in this case also sought restitution pursuant to Section 209 for illegal overcharging from the sale of crude oil. Thus, as in *West Texas Marketing*, the remedy sought by the DOE is also restitutionary.

With respect to Appellee's contention pertaining to pecuniary loss, *West Texas Marketing* is again controlling. *West Texas Marketing* held that the question of "pecuniary loss" sustained by the holder of a claim is only considered when a penalty is inovlved. Since the DOE's claim was for restitution the court reasoned that the issue of whether the DOE sustained "pecuniary loss" was immaterial.

As in the case at bar, *In re Compton Corp.*, and *In re Seneca Oil Co.*, 76 B.R. 818 (W.D.Okl. 1987) also considered arguments suggesting that the respective courts should consider bankruptcy policy and bar all claims against a bankrupt in the absence of pecuniary loss. While acknowledging this policy, both courts nevertheless rejected this argument. *In re Compton*, 90 B.R. at 801; *In re Seneca Oil Co.*, 76 B.R. at 820.

> The appellees herein ("the Bank Group") argue that the TECA decision in *West Texas Marketing* is not binding on the Bankruptcy Court in this case, citing *Simonson v. Granquist*, 369 U.S. 38, 82 S.Ct. 537, 7 L.Ed.2d 557 (1962). The Bank Group argues that *Simonson* makes clear the congressional purpose to bar all claims of any kind against the bankrupt ex-

> cept those based on a pecuniary loss. . . . The Bank Group urges that TECA's decision in *West Texas Marketing* that the issue of pecuniary loss is immaterial is directly at odds with the Supreme Court holding *Simonson*. The Court is unpersuaded. The Court believes that the Court of Appeals decision in *West Texas Marketing* on the exact issue now before the Court is more compelling than the Supreme Court's interpretation of the penalty provision of the Bankruptcy Code in a tax context.

In re Seneca Oil Co., 76 B.R. at 820.

For the foregoing reasons, the Court finds that *West Texas Marketing* controls the instant controversy and that the DOE's claim was improperly subordinated to the extent that the DOE was unable to specifically identify overcharge victims.

IT IS THEREFORE ORDERED that the decision of the bankruptcy court subordinating the Department of Energy's claim to the extent that the Department of Energy does not identify specific overcharge victims is REVERSED.

IT IS FURTHER ORDERED that the Department of Energy is granted an allowed unsecured claim for $372,151.67.

DATED: August 17, 1990.

PHILIP M. PRO

PHILIP M. PRO
United States District Judge

APPENDIX G

TIMOTHY S. CORY, ESQ.
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(702) 388-1996
Attorney for Trustee/Appellee

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AND FILED
AUG 23 '90
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BY_____
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-S-89-840-PMP(LRL)
BK-S-77-730 LO

IN RE:
TRANSCONTINENTAL ENERGY CORPORATION,
Debtor.

UNITED STATES DEPARTMENT OF ENERGY,
Appellant,

v.

RICHARD A. DAVIS, TRUSTEE,
Appellee.

NOTICE OF APPEAL

TO: ARTHUR WEISSBRODT, ESQ., Judicial Litigation Division, Economic Regulatory Admnistration, U.S. Department of Energy, Room 6H-034, RG-33, 1000 Independence Avenue, SW., Washington, D.C. 20485.

TO: WILLIAM MADDOX, ESQ., United States Attorney, 330 S. Third Street, 7th Floor, Las Vegas, Nevada 89101

Appellee, Richard A. Davis, hereby appeals to the United States Court of Appeals ford the Ninth Circuit, from the Judgment entered in the United States District Court on August 20, 1990, in the above-captioned proceeding.

Parties to the Judgment appealed are:

Arthur Weissbrodt, Esq.
Judicial Litigation Division
Economic Regulatory Administration
U.S. Department of Energy
Room 6H-034, RG-33
1000 Independence Avenue, SW
Washington, DC 20485

Patrick C. Clary, Esq.
415 S. Sixth Street, #200
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William Maddox, Esq.
United States Attorney
330 S. Third Street
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Las Vegas, Nevada 89101

DATED this 21st day of August, 1990.

TIMOTHY S. CORY, CHARTERED

/s/Timothy S. Cory, Esq.

TIMOTHY S. CORY, ESQ.
515 S. Third Street
Las Vegas, Nevada 89101
Attorney for the Trustee/
Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a copy of the NOTICE OF APPEAL in case no. CV-S-89-840 PMP(LRL), bankruptcy no. BK-S-77-730 LO, on the below listed party, by mailing a true and correct copy through the United States Postal Service, postage prepaid, first class, on the 22 day of August, 1990.

Arthur Weissbrodt, Esq.
Judicial Litigation Division
Economic Regulatory Administration
U.S. Department of Energy
Room 6H-034, RG-34
1000 Independence Avenue, SW
Washington, DC 20485

William Maddox, Esq.
United States Attorney
330 S. Third Street
7th Floor
Las Vegas, Nevada 89101

Barbie illegible

AN EMPLOYEE OF
TIMOTHY S. CORY, CHARTERED

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 91-15357

IN RE:
TRANSCONTINENTAL ENERGY CORPORATION,
Debtor.

RICHARD A. DAVIS, TRUSTEE,
Appellant,

v.

UNITED STATES DEPARTMENT OF ENERGY,
Appellee.

APPELLEE'S MOTION TO TRANSFER THIS APPEAL TO THE TEMPORARY EMERGENCY COURT OF APPEALS

Pursuant to 28 U.S.C. § 1631, the United States Department of Energy respectfully moves this Court for an order transferring this appeal to the Temporary Emergency Court of Appeals ("TECA"). The issue adjudicated by the district court — whether the DOE's claim in bankruptcy is for restitution or for a fine, penalty or forfeiture — arises under Section 209 of the Economic Stabilization Act ("ESA"), 12 U.S.C. § 1904 note, as incorporated into the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. § 754 which vest exclusive jurisdiction for appeals arising under these laws in the TECA. *United States Department of Energy v. West Texas Marketing Corp.*, 763 F.2d 1411, 1423-24 (TECA 1985).

I. FACTUAL BACKGROUND

On March 30, 1979, the DOE issued a Notice of Probable Violation to Transcontinental Energy Corporation ("Transcontinental") pursuant to its authority under Section 209 of the ESA, alleging unlawful overcharges of $353,379.39, plus prepetition interest, from Transcontinental's sales of crude oil. On April 4, 1979, the DOE filed its proof of claim in Transcontinental's bankruptcy to recover those overcharges. The Trustee ultimately conceded that Transcontinental had overcharged its customers in the demanded amount. However, the Trustee objected that DOE's claim under § 209 of the ESA was not for restitution but was for a penalty which should be disallowed under Section 57(j) of the Bankruptcy Act.[1] The DOE responded that the issue had already been resolved in *United States Department of Energy v. West Texas Marketing Corp.*, 763 F.2d 1411 (TECA 1985) where the TECA had held that the DOE's claim to recover overcharges was for restitution, was not a penalty and must therefore be allowed.

While the Bankruptcy Court found that the DOE's claim was for restitution and the *West Texas Marketing* controlled, it was nevertheless found that the DOE's claim was still a penalty to the extent that DOE did not identify specific overcharge victims. (Attachment A hereto). On June 19, 1989, the bankruptcy court denied DOE's motion for reconsideration.

DOE appealed this contradictory decision to the district court which reversed:

> The Court rejects Appellee's arguments and finds that the findings enunciated in *West Texas Marketing*

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[1]Section 57(j) of the Bankruptcy Code was amended in 1978 by Section 726(a)(4) of the Bankruptcy Code. Section 726(a)(4) is substantially similar to section 57(j) except that it subordinates, rather than disallows, penalty claims.

> control the instant controversy. The Temporary Emergency Court of Appeals has exclusive appellate jurisdiction to construe ESA and EPAA provision. In *West Texas Marketing*, the court, relying on the plain language of Section 209, held that the DOE's claim was for restitution and did not constitute a penalty. *West Texas Marketing Corp., 763 F.2d at 1426.*
>
> *As in West Texas Marketing*, the DOE in this case also sought restitution pursuant to Section 209 for illegal overcharging from the sale of crude oil. Thus, as in *West Texas Marketing*, the remedy sought by the DOE is also restitutionary.

Slip Op. at 10-11 (Attachment B).

Transcontinental then noticed its appeal in this Court rather than the TECA.

II. ARGUMENT

Appellant apparently bases its choice of this forum on *In re Seneca Oil Co.*, 906 F.2d 1445 (10th Cir. 1990), in which the Tenth Circuit disagreed with the TECA's jurisdictional analysis in *West Texas Marketing* and held that it — and not the TECA — had jurisdiction to decide the identical penalty issue previously raised in and decided by the TECA in *West Texas Marketing*.[2] Accordingly, this Court must now decide which jurisdictional analysis is correct — the TECA's or the Tenth Circuit's. For the reasons shown below, this Court should adopt the TECA's analysis.

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[2]The Tenth Circuit, nevertheless, agreed with TECA's substantive conclusion that DOE's claim was for restitution and not a fine, penalty, or forfeiture. *Seneca*, 906 F.2d at 1455-56. Since the DOE prevailed on the merits in *Seneca*, the government attempted no appeal on the conflicting jurisdictional ruling of the Tenth Circuit.

In 1970, Congress enacted the Economic Stabilization Act ("ESA") and created the Temporary Emergency Court of Appeals to hear all appeals arising under that Act:

> Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder.

12 U.S.C. § 1904 note, § 211(b)(2).

The legislative history of the ESA makes clear that Congress vested exclusive jurisdiction in the TECA "to funnel into one court all the appeals arising out of the District Courts and thus gain consistency of decision." S. Rep. No. 92-507, at 10, *reprinted in* [1971] U.S. Code Cong. & Admin News 2283, 2292. For this reason, the Supreme Court subsequently acknowledged the exclusivity of TECA's jursidiction in *Bray v. United States*, 423 U.S. 73, 74 (1975).

Questions arose, however, as to whether the TECA's jurisdiction extended to relevant issues which arose in the context of statutes, rules and regulations other than the ESA and the TECA and other circuit courts ultimately ruled that "[a]n issue arising under the [ESA or EPAA] is one which involves the construction, applicability or effect of the acts or the regulations promulgated under the acts." *See, e.g., Isla Petroleum Corp. v. Puerto Rico Dep't of Consumer Affairs*, 811 F.2d 1511 (TECA 1986). The TECA's jurisdiction also extends to deciding questions that do not arise independently of the substantive ESA/EPAA claim or cause of action and have no life apart from the substantive claim, such as mootness, venue, exhaustion of administrative remedies, discovery and evidentiary issues. *See, e.g., Stertz v. Gulf Oil Corp.*, 783 F.2d 1064,

1069 (TECA 1986); MGPC, Inc. v. DOE, 673 F.2d 1277, 1281 (TECA 1982).

The TECA has refused to exercise jurisdiction only in rare cases where "severable" issues raised did not involve the interpretation, construction of the ESA or EPAA, *e.g.*, *Spinetti v. Atlantic Richfield Co.*, 522 F.2d 1401 (TECA 1975) (antitrust and contract claims do not arise under ESA) or where the question on appeal dealt solely with another statute and required no interpretation of the ESA or EPAA, *e.g.*, *Texaco Inc. v. DOE*, 616 F.2d 1193 (TECA 1979) (the only issue on appeal was procedural and arose solely out of the Department of Energy Organization Act).

In *West Texas Marketing*, the TECA had before it the identical issue on appeal here, *i.e.*, whether a DOE remedial order is a claim for restitution or a "penalty" which would give it a lower priority under the bankruptcy code.[3] West Texas Marketing asserted that DOE's claim in bankruptcy was for a penalty which should be given fourth priority under 11 U.S.C. § 726(a)(4). The DOE alleged that its claim was for restitution and thus entitled to second priority as a general unsecured claim under 11 U.S.C. § 726(a)(2). The TECA found that the appeal "arose under" the EPAA and ESA:

> In the present case, the paramount issue that had to be decided in the district court was not whether a claim for a "penalty" might be subordinated under the Bankruptcy Act. No one could, did, nor can question this. it was whether the claim of DOE as premised entirely upon provisions of the ESA and the EPAA and its regulations was in fact and law one for a penalty or one for restitution.

[3] *In West Texas Marketing*, TECA reversed per curiam, 763 F.2d at 1425, its original decision by Judge Sear, 763 F.2d at 1413, and adopted as part of the majority opinion the concurrence of Judge Christensen, 763 F.2d 1418, in which he addresses the issue of whether the appeal arises under the ESA.

* * * *

> The bankruptcy judge and the district court necessarily had to consider EPAA/ESA issues in arriving at a proper decision whether DOE's claim was for a penalty or for restitution.

West Texas Marketing, 763 F.2d at 1423-24[4] *See also, United States v. Sutton*, 795 F.2d 1040, 1061 (TECA 1986), *cert. denied*, 107 S.Ct. 873 (1987) ("An award of restitution [under ESA§ 209] is an equitable remedy, and not a penalty"); *In re Compton*, 90 B.R. 798, 800-803 (Bankr. N.C. Tex. 1988) *appeal dismissed*, 889 F.2d 1104 (TECA 1989); *Department of Energy v. Gratex Corp.*, 66 B.R. 209 (Bankr. N.C. Tex 1986); In re Independent Refining Corp., 65 B.R. 622, 626-7 (Bankr. S.D. Tex. 1986). On the substantive issue, the TECA decided that "[t]he DOE's claim is clearly for restitution and not for a penalty." *West Texas Marketing*, 763 F.2d at 1426.

The same issue decided by the TECA in *West Texas Marketing* was presented to the Tenth Circuit in *In Re Seneca Oil Co.*, 906 F.2d 1445 (10th Cir. 1990). The court first defined TECA's jurisdiction very narrowly to include only "the construction, validity, or effect of the ESA or EPAA," 906 F.2d at 1454. It then rejected the TECA's jurisdictional holding in *West Texas Marketing* and held instead that the issue presented was one of bankruptcy law and did not "arise under" the ESA or EPAA. Although admitting that the ESA and EPAA created

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[4]TECA also explained that:

> . . . just as a complaint filed under the Declaratory Judgment Act challenging an EPAA claim 'arises under' the EPAA and not under the Declaratory Judgment Act, the claim here 'arises under' the EPAA and not under the Bankruptcy Act.

West Texas Marketing, 763 F.2d at 1421.

the DOE claim, the court opined that these Acts merely provided the "backdrop" for the issue of what priority to accord the claim under the bankruptcy law. The Tenth Circuit's jurisdictional analysis ignores the inescapable need to evaluate the source of a claim in order to determine its character. Only by interpreting the words and intended meaning of the ESA and the EPAA can a court determine the nature of the DOE's claim so that it may be assigned the appropriate priority under the bankruptcy code. This is why the TECA found that it had exclusive jurisdiction to decide the issue pending before court: "The bankruptcy judge and the district court necessarily had to consider EPAA/ESA issues in arriving at a proper decision whether DOE's claim was for a penalty or for restitution." *West Texas Marketing*, 763 F.2d at 1424. Indeed, the Tenth Circuit itself necessarily quotes from and construes section 209 of the ESA in order to reach its conclusion that the DOE's claim was for restitution and not a penalty. *Seneca*, 906 F.2d at 1456.

Seneca is the only case contradicting *West Texas Marketing* on the issue of the TECA's exclusive jurisdiction to interpret the ESA and should not be followed. While the Tenth Circuit framed the issue as one arising only under the Bankruptcy Code, in reality it reached its decision on the basis of its interpretation of the ESA. This ruling contravened the clear intention of Congress that issues arising under the ESA were to be funneled to one court, not to be the subject of possible varying interpretations by the other circuit courts. Since the TECA has determined the scope of its jurisdiction on the identical issue now before this Court in *West Texas Marketing*, its judgment as to the scope of its authority under its own authorizing statute should be respected. Deference to the TECA will not only comply with Congressional intent, but will afford litigants predictability and consistency and avoid precisely the kind of conflict that *Seneca* has the potential for creating.

For the foregoing reaosns, the Department of Energy respectfully requests this Court to transfer this appeal to the TECA pursuant to 28 U.S.C. § 1631 just as it has transferred other cases in which the TECA had jurisdiction. *See, e.g., United States v. Wickland,* 619 F.2d 75, 77-79 (TECA 1980) (On November 16, 1979, this Court transferred that subpoena enforcement appeal to the TECA); *United States v. Cooper,* 482 F.2d 1393, 1398-1400 (TECA 1973) (On March 23, 1973, this Court transferred that rent control violation appeal to the TECA).

Respectfully Submitted,

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RICHARD F. AHERN
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Attorneys for Appellee

Dated: April 3, 1991

ATTACHMENT A

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Chapter 11
BK-S-77-730

IN RE:
TRANSCONTINENTAL ENERGY CORPORATION,
Debtor,

RICHARD A. DAVIS, TRUSTEE,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF ENERGY,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The contested claim of the U.S. Department of Energy ("DOE") came before this court on cross motions for summary judgment. Having duly considered the arguments and submissions of counsel the court finds and concludes as follows:

FINDINGS OF FACT

1. Transcontinental Energy Corporation ("TEC"), a Nevada Corporation, filed a petition for bankruptcy under Chapter XI of the Bankruptcy Act of 1898, as amended, on October 14, 1977.

2. By order dated October 21, 1977, the court appointed Robert N. Broadbent as Receiver. On October 5, 1978, TEC was adjudicated bankrupt, and Mr. Broadbent was appointed Trustee. In March 1981, Richard A. Davis succeeded Mr. Broadbent as Trustee.

3. Interests in two oil wells in long Beach, California, the "Moore Well" and the "Harrison Lease," were among the assets of the debtor at the time of filing.

4. TEC was engaged in the business of producing and selling crude oil from 1975-80, during the period when mandatory petroleum price and allocation regulations were in effect. In late 1978, the DOE conducted an audit of TEC's pricing practices, which audit resulted in the issuance of a notice of probable violation by the DOE to TEC on March 30, 1979.

5. The DOE filed a proof of claim in this case on April 4, 1979, and an amended proof of claim on October 22, 1985, for overcharges revealed by the above referenced audit.

6. The Trustee filed an objection to the DOE's claim on December 4, 1980, as to both the validity and the calculation of the alleged overcharges.

7. On November 25, 1985, the DOE filed a motion for summary judgment. The Trustee filed an opposition to the DOE's motion and a cross motion for summary judgment on January 31, 1986. On March 7, 1986, the DOE filed its reply to the Trustee's opposition and its opposition to the Trustee's motion. The Trustee replied to the DOE's opposition on May 8, 1986.

8. On August 19, 1986, this court issued a minute entry order granting summary judgment in favor of the trustee and against the DOE, and directing the Trustee to lodge proposed findings of fact and conclusions of law.

9. On September 27, 1988, the Trustee submitted proposed findings of fact and conclusions of law. Objections thereto were heard on September 30, 1988, at which time the DOE informed the court that the authority upon which the Trustee had relied, *In re Compton*, 40 B.R. 880 (N.D. Texas, 1984), had been reversed. *See In Re Compton*, No. CA4-86-647-K (N.D. Texas, August 9, 1988), *appeal docketed* No. 88-1680 (*5th Cir.*, 1988). This Court stated that it would reconsider its minute entry order, and directed the Trustee to submit findings of fact and conclusions of law in that connection. That matter was heard on November 7, 1988.

10. Pursuant to the emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. Section 751 *et seq.*, the DOE issued regulations which established price controls on the sale of crude oil. 10 C.F.R. Sections 210 and 212.

11. A "producer" of crude oil is a firm which produces crude oil or owns crude oil when it is produced, 10 C.F.R. Section 212.31. TEC was a producer of crude oil between 19 75 and 1980 and was thus subject to the EPAA and the regulations promulgated thereunder.

12. Oil produced from "stripper wells" was exempted from price controls except for the period between February 1, 1976 and August 31, 1976, when such crude oil was subject to the "upper-tier" ceiling price rule. 6 C.F.R. Section 150.54(s) and 10 C.F.R. Section 212.74.

13. A "stripper well" is one whose average daily production ("ADP") did not exceed 10 barrels per day during a previous 1 year period. *See*, 6 C.F.R. Section 150.54 (38 Fed. Reg. 34464 and 34465, December 14, 1973) and 10 C.F.R. Section 210.32(b); 10 C.F.R. Section 210.32(b); 10 C.F.R. Section 212.54 (the various regulations reflect technical amendments to the definition of stripper wells and the prior 1 year period).

14. The Harrison Lease had an ADP from 1972 through 1974 in excess of 10 barrels per day each year. In 1975, the Harrison Lease production averaged less than 10 barrels per day, thus qualifying it as a stripper well effective January 1, 1976.

15. From January 1975 through December 1975, TEC sold the Harrison Lease production at stripper well prices, notwithstanding that it did not so qualify. This resulted in the receipt by TEC of illegal overcharges in the amount of $20,353.46, and the accumulation of pre-petition interest in the amount of $4,140.91. The affidavit of Darrell W. Smith (attached to DOE's motion for summary judgment) sets forth the DOE's audit methodology and results, which are uncontested by TEC.

16. The Moore Well's ADP from 1972 through 1980 was in excess of 10 barrels per day each year. Consequently, the crude oil produced from the well for this period did not qualify as stripper well oil.

17. From March 1975 through December 1980, the Moore Well production was sold at stripper well prices. This resulted in illegal overcharges received by TEC totalling $333,025.93, and pre-petition interest accumulation in the amount of $14,631.37. TEC does not dispute the receipt of these overcharges. The affidavit of Darrel W. Smith sets forth the DOE's audit methodology and results.

18. The Economic Stabilization Act of 1970 ("ESA"), as incorporated into the EPAA, contains two sections: one which authorizes the DOE to seek restitution of illegal overcharges (Section 209 of the ESA, 12 U.S.C. Section 1904) and one which authorizes the DOE to seek civil or criminal penalties (Section 210 of the ESA). *See* EPAA, 15 U.S.C. Section 754(a)(1) and (3).

19. Under former Section 57(j) of the Bankruptcy Act, applicable in the present case, a debt owing to the United States as a penalty is disallowed. Section 736(a)(4) of the Bankruptcy Code, which amended Section 57(j), is substantially similar to the former section except that it subordinates rather than disallows penalty claims.

20. Although the notice of probable violation attached to the DOE's proof of claim made reference to potential assessment of penalties under 10 C.F.R. Section 205.203 (up to $20,00 day), none were ever assessed against TEC. Instead, the DOE's claim is based solely on Section 209 of the ESA, and it seeks a dollar for dollar refund of unlawful overcharges by TEC.

21. The DOE cannot presently identify any of the entities who were overcharged by TEC and for whom it seeks restitution of the illegal overcharges; however, the DOE can and will employ appropriate measures to determine the identity of and injury to each victim.

CONCLUSIONS OF LAW

1. This court has jurisdiction of this matter pursuant to 28 U.S.C. Sections 1334 and 157(b)(2).

2. The DOE is entitled to an allowed claim for illegal overcharges in the amount of 353,379.39 and to pre-petition interest thereon in the amount of $18,772.28. Said claim is properly made on behalf of numerous private persons notwithstanding their independent right to make such claim. *In reWest Texas Marketing*, 82 B.R. 829, 830-31 (S.D. Tex, 1988) (on remand); *see In re Evans Products Co.*, 60 B.R. 863 (D.C. S.D. Fla. 1986)

3. The DOE's claim is a claim for restitution which may not be disallowed as a penalty, but which is nevertheless sub-

ject to the Bankruptcy Act. *United States v. West Texas Marketing Corp.*, 763 F.2d 1411, 1426 (TECA, 1985).

4. The DOE's claim for restitution is a general unsecured claim; however, any portion thereof which cannot be returned to an overcharge victim is payable to the treasuries of state and federal governments. 51 F.R. 27899 (August 4, 1986).

5. The Bankruptcy Act mandates that available funds be distributed to creditors with identifiable claims. *In re West Texas Marketing*, 82 B.R. 829, 830-31 (S.D. Tex, 1988) (on remand).

6. A distribution of the overcharges to the treasuries of state and federal governments is contrary to the spirit and intent of the Bankruptcy Act. *In re West Texas Marketing*, 82 B.R. 829, 830-31 (S.D. Tex, 1988) (on remand).

7. The DOE claim is entitled to the same treatment in principal and interest as all other general unsecured claims, except that no amount may be paid to the DOE for post petition interest or for payment to state or federal treasuries if to do so would impair any of the general unsecured creditors with allowed claims or would otherwise constitute a preference of identifiable overcharge victims over the other unsecured creditors.

8. After payment to all identified overcharge victims within the DOE claim, and to all other general unsecured creditors of the debtor with allowed claims, that portion of the DOE claim which cannot be traced to victims, being instead payable to state or federal treasuries, shall be an allowed claim disbursable to the extent of available assets.

ORDER

Based upon the foregoing findings of fact and conclusions of law, and grounds therefore appearing,

IT IS ORDERED vacating this court's minute entry order of August 19, 1986.

IT IS FURTHER ORDERED allowing the claim of the DOE as a general unsecured claim in the amount of $20,353.46 as to the Harrison lease, and $333,025.93 as to the Moore Well, together with pre-petition interest in the amount of $18,772.28.

IT IS FURTHER ORDERED staying disbursement upon any allowed general unsecured claims except upon further order or as follows:

A) From the total funds available for distribution to allowed general unsecured claims, the pro rata share of the DOE claims should be sequestered, and the remainder may be distributed pro rata to the other allowed general unsecured claims.

B) Upon filing of a notice of determination by the DOE of the amount of restitution payable to an identified overcharge victim, the pro rata disbursement on such amount shall be made to the DOE for payment to such victim.

C) Any portion of the sequestered allowed claim of the DOE which cannot be disbursed to an overcharge victim so entitled shall be equitably disbursed pro rata amongst the identified overcharge victims and the other allowed general unsecured claims.

D) After all identified overcharge victims and all other general unsecured creditors with allowed claims have been

paid in full and without impairment, disbursement shall be made to the DOE on the remaining balance of its claim.

IT IS FURTHER ORDERED allowing the DOE 180 days, and such additional time as may hereafter be granted for cause, to file notices of determinations as to the overcharge victims.

IT IS FURTHER ORDERED directing counsel for the DOE to lodge a form of judgment.

DATED this 23 day of January, 1989.

LAWRENCE OLLASON

LAWRENCE OLLASON
Bankruptcy Judge

Copy of the foregoing mailed this 24 day of January, 1969, to:

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Deputy CLerk

ATTACHMENT B

UNTIED STATES DISTRICT COURT
DISTRICT OF NEVADA

CASE NUMBER: CV-S-89-840-PMP(LRL)
BK-S-77-730-LO

IN RE:
TRANSCONTINENTAL ENERGY CORPORATION,
Debtor.

v.

UNITED STATES DEPARTMENT OF ENERGY,
Appellant,

v.

RICHARD A. DAVIS, TRUSTEE
Appellee.

JUDGMENT IN A CIVIL CASE

☒ **Decision by Court.** This action came to be considered by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED the decision of the bankruptcy court subordinating the Department of Energy's claim to the extent that the Department of Energy does not identify specific overcharge victims is REVERSED.

IT IS FURTHER ORDERED that the Department of Energy is granted an allowed unsecured claim for $372,151.67.

RECEIVED
AUG 20 1990
U.S. ATTORNEY,
LAS VEGAS

ENTERED
AUG 20 1990
CLERK, U.S.
DISTRICT COURT
DISTRICT OF NEVADA
By efm DEPUTY

FILED
AUG 20 1990
CLERK, U.S.
DISTRICT COURT
DISTRICT OF NEVADA
By efm DEPUTY

August 20, 1990
Date

CAROL C. FITZGERALD
Clerk

Faye McMillan
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE STATE OF NEVADA

RECEIVED
AUG 17 '90
By efm
Deputy

CV-89-840-PMP (LRL)
BK-S-77-730-LO

RECEIVED
AUG 20 1990
U.S. ATTORNEY
LAS VEGAS, NV

IN RE:
TRANSCONTINENTAL ENERGY CORPORATION,
Debtor.

v.

UNITED STATES DEPARTMENT OF ENERGY,
Appellant,

v.

RICHARD A. DAVIS, TRUSTEE
Appellee.

ENTERED
AUG 20 1990
CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY efm DEPUTY

This is an appeal from a Final Order entered by the Bankruptcy Court on June 22, 1989, which denied Appellant's Motion for reconsideration of the Bankruptcy Court's Findings of Fact and Conclusions of Law entered January 27, 1989. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 158(a).

FACTUAL BACKGROUND

The underlying action arose from the bankruptcy proceedings relating to Debtor Transcontinental Energy Corporation (hereinafter "Transcontinental"), initiated on October 14, 1977. On October 5, 1978, Transcontinental was adjudicated bankrupt and a Trustee, Robert N. Broadbent, was appointed. In March 1981, Appellee, Richard A. Davis, succeeded Broadbent as Trustee.

On April 4, 1979, Appellant, United States Department of Energy (hereinafter "DOE") filed a Proof of Claim. Appellant filed an Amended Proof of Claim on October 22, 1985, predicated on the following:

(1) a Notice of Probable Violation, dated March 30, 1979, issued by the DOE to Transcontinental pursuant to Section 209[1] of the Economic Stabilization Act of 1970 (hereinafter "ESA"), 12 U.S.C. § 1904 note, as incorporated into section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 (hereinafter "EPAA"), 15 U.S.C. § 754(a)(1), which alleged that Transcontinental unlawfully overcharged from the sale of crude oil on two Transcontinental-owned properties, the Harrison Lease and the Moore Well; and

(2) continuing violations of Section 209 by Transcontinental with respect to the Moore Well.

The DOE seeks restitution of $372,151.67, which consists of the illegal overcharges plus pre-petition interest.[2]

On December 4, 1980, the Trustee filed an objection to the DOE's claim. On November 25, 1985, the DOE filed a Motion for Summary Judgment and the Trustee filed a Cross-Motion for Summary Judgment on January 31, 1986. At issue were the merits of the DOE's claim as well as whether the DOE's claim should be characterized as restitutionary or as a penalty. If the claim were termed a penalty, then the claim

---

[1]Section 209 authorizes the DOE to seek restitution of illegal overcharges.

[2]The illegal overcharges can be broken down as follows:

(1) $20,353.46 for overcharges from the Harrison Lease property from January 1975 through December 1975; and

(2) $333,025.93 for overcharges from the Moore Well property, dating from March 1975 through December 1980.

The pre-petition interest totals $18,772.28.

would be disallowed pursuant to Section 57(j) of the Bankruptcy Act.

On August 25, 1986, the bankruptcy court issued a Minute Entry and Order granting the Motion for Summary Judgment in favor of the trustee and further ordered the Trustee to prepare the judgment. However, the bankruptcy court reconsidered its Minute Entry and Order following the reversal of *In re Compton Corp.*, 40 B.R. 880 (N.D.Tex. 1984).[3] *See In Re Compton Corp.*, 90 B.R. 798 (N.D.Tex. 1988). Upon rehearing the matter on November 7, 1988, the Trustee confined his objections to the restitution/penalty issue.

On January 27, 1989, the bankruptcy court issued Findings of Fact and Conclusions of Law at pages 6-7 which found in pertinent part:

> 3. The DOE's claim is a claim for restitution which may not be disallowed as a penalty, but which is nevertheless subject to the Bankruptcy Act. *United States v. West Texas Marketing Corp.*, 763 F.2d 1411, 11426 (TECA, 1985).
>
> 4. The DOE's claim for restitution is a general unsecured claim; however, any portion thereof which cannot be returned to an overcharge victim is payable to the treasuries of state and federal governments. 51 F.R. 27899 (August 4, 1986).
>
> 5. The Bankruptcy Act mandates that available funds be distributed to creditors with identifiable claims. *In re West Texas Marketing*, 82 B.R. 829, 830-31 (S.D. Tex. 1988) (on remand).

* * *

[3]The Trustee had relied upon *In re Compton Corp.*, 40 B.R. 880 (N.D. Tex. 1984) in arguing that the DOE's claim constituted a penalty.

7. The DOE claim is entitled to the same treatment in principal and interest as all other general unsecured claims, except that no amount may be paid to the DOE for post petition interest or for payment to state or federal treasuries if to do so would impair any of the general unsecured creditors with allowed claims or would otherwise constitute a preference of identifiable overcharge victims over the other unsecured creditors.

8. After payment to all identified overcharge victims within the DOE claim, and to all other general unsecured creditors of the debtor with allowed claims, that portion of the DOE claim which cannot be traced to victims, being instead payable to state or federal treasuries, shall be an allowed claim disbursable to the extent of available assets.

Findings of Fact and Conclusions of Law, Docket #14.

The DOE moved the bankruptcy court to reconsider its Findings regarding the subordination of the DOE's claim. On June 22, 1989, the bankruptcy court issued an Order denying the DOE's Motion for Reconsideration with respect to the subordination of the DOE's claim, and the DOE appealed. The Appeal was fully briefed and submitted to the court for decision on March 26, 1990.

DISCUSSION

The issue presented to this Court is whether the bankruptcy court erred in treating the DOE's claim as a penalty to the extent the DOE does not identify specific overcharge victims under applicable pricing laws. This Court must also determine whether the case of *Department of Energy v. West Texas Marketing*, 763 F.2d 1411 (TECA 1985) is controlling.

The bankruptcy court's Findings of Fact and Conclusions of Law must be reviewed by the clearly erroneous and de novo standards respectively. *In re Daniels-Head & Associates*, 819 F.2d 914 (9th Cir. 1987).

Appellant argues that the bankruptcy court erred in treating the DOE's claim as a penalty to the extent the DOE does not identify specific overcharge victims. Specifically, Appellant claims that the bankruptcy court, though correctly relying upon *West Texas Marketing*, 763 F.2d 1411, in finding that the DOE's claim was for restitution and not for a penalty, incorrectly followed *In re West Texas Marketing Corp.*, 82 BR 829 (N.D.Tex. 1988) in subordinating the DOE's claim to all other allowed general unsecured claims to the extent that the DOE fails to specifically identify the overcharge victims.

Instead, Appellant submits that given the Temporary Emergency Court of Appeals' exclusive appellate jurisdiction to construe ESA and EPAA regulations, this Court is bound by the Temporary Emergency Court of Appeals' decision in *West Texas Marketing*. Appellant contends that consistent application of the restitution principle enunciated in *West Texas Marketing* is evidenced in *In re Compton Corp.*, 90 B.R. 798 (N.D.Tex,. 1988). There, the court reversed the bankruptcy court's subordination of the DOE's claim to the fourth priority, as a penalty, to the extent that the DOE was unable to identify specific overcharge victims.

Citing *West Texas Marketing*, the Court noted:

> Finally, and perhaps most significantly, the TECA expressly vitiated Appellee's alternative argument herein that the DOE's claim can be for restitution only to the extent that it can identify and reimburse the parties or entities actually injured as a result of Compton's illegal overcharges. "WTM's [West Texas Marketing's] opinion as to the effectiveness

> of [the] DOE in distributing funds collected to the actual parties who were overcharged *cannot change the resitutionary character of [the] DOE's claim .'' Id.* . . . In light of the foregoing, the Court is of the opinion that the Bankruptcy Court's relegation of the DOE's claim to the fourth priority must be reversed.

In re Compton, 90 B.R. at 802-803 (emphasis added).

Appellee responds that *West Texas Marketing* does not control the issue before this Court. Appellee argues that the decision in *West Texas Marketing* was not final pursuant to 28 U.S.C. § 158(d)[4] and that it was not a collateral order exception under 28 U.S.C. § 1291.[5] Title 28, U.S.C. § 1921 states:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may

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[4]Title 28 U.S.C. § 158(d) provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

[5]Appellee notes that in the original memorandum decision in *West Texas Marketing*, Judge Sear determined that the bankruptcy order from which the DOE appealed was neither final within the meaning of 28 U.S.C. § 158(d) nor qualified as a collateral order exception under 28 U.S.C. § 1291. *West Texas Marketing*, 763 F.2d at 1417. Accordingly, Appellee notes that the original memorandum decision did not address the correctness of the bankruptcy court's decision regarding the subordination of the DOE's claim ''or any issues relating to the Temporary Emergency Court of Appeal's (hereinafter ''TECA'') subject matter jurisdiction to hear the appeal.''

> be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in section 1292(c) and (d) and 1295 of this title.

Moreover, Appellee argues that the concurring opinions of Judges Christensen and Estes are mere dicta with respect to the subject matter jurisdiction of the Temporary Emergency Court of Appeals. Appellee argues that such dicta constitutes insufficient judicial precedent for *stare decisis* to be applicable to the instant controversy. Further, Appellee contends that the respective concurring opinions are "not dispositive of the issue regarding the subordination of the DOE's claim."

The Court rejects Appellee's initial arguments pertaining to the controlling influence of *West Texas Marketing*. Upon rehearing, the Temporary Emergency Court of Appeals determined that the issue of the subordination of the DOE's claim was in fact appealable under the collateral order doctrine. *West Texas Marketing*, 763 F.2d at 1425.[6]

Further, both the Temporary Emergency Court of Appeals in *West Texas Marketing* and the court in *In re Compton Corp.*, have held that the Temporary Emergency Court of Appeals has exclusive appellate jurisdiction to decide issues arising

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[6]The court in *West Texas Marketing* explained the basis underlying the court's finding of jurisdiction:

> In its petition for rehearing, DOE presented information which leads us to the conclusion that unless this court decides the issue of the subordination of DOE's claim, the amount of that claim will never be finally determined and the DOE will have no real opportunity to pursue this matter on appeal. This allows us to decide the merits of this appeal under the collateral order doctrine developed in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed.2d 1528 (1949).

West Texas Marketing, 763 F.2d at 1425.

under the ESA and/or the EPAA.[7] *See West Texas Marketing*, 763 F.2d at 1420-24, 1426; *In re Compton*, 90 B.R. at 801, n. 9. Therefore, since the instant controversy concerns Section 209 of the ESA and in light of jurisdictional holdings in *West Texas Marketing*, the Court finds that Appellee's initial opposition is without merit.

Appellee next contends that *West Texas Marketing* is inapplicable to the instant controversy since the Court interpreted 11 U.S.C. § 726(a)(4)[8], a provision different from that at issue in this case. Given that Debtor Transcontinental's action was filed under Chapter 11 of the Bankruptcy Act of 1898, Appellee argues that the instant case should be construed in accordance with the case law interpreting Section 57(j)[9], which

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[7]The Court need not decide the merits of Appellant's argument that this court is bound, by virtue of the doctine of *stare decisis*, by the decision in *West Texas Marketing*. Instead, this Court can effectively decide the merits of the instant appeal independent of such analysis. Moreover, the Court disagrees with Appellee's assertion that the concurring opinions of Judges Christensen and Estes, with respect to the issue of subject matter jurisdiction, are mere dicta.

[8]Title 11 U.S.C. § 726(a)(4) provides:

(a) Except as provided in section 510 of this title, property of the estate shall be distributed—

* * *

(4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forefeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim;

[9]Section 57(j) of the Bankruptcy Act provided:

Debts owing to the United States or to any States or any subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose . . .

requires "pecuniary loss" in order to avoid disallowance of a claim as a penalty.

Section 726(a)(4) is the successor penalty provision to § 57(j). As both parties acknowledge, the two sections are substantially identical as they pertain to the issue of whether DOE's claim should be construed as a penalty to the extent the DOE is unable to identify specific overcharge victims. The distinguishing feature between the two provisions is that under § 57(j) penalty claims are disallowed, whereas under § 726(a)(4) such claims are subordinated. In light of the similarity and successive nature of the provisions, the Court finds that § 209, the submitted basis for the DOE's claim, must be construed in the same manner under either section. Therefore, when determining whether the DOE's claim is restitutionary or is a penalty, the distinction between § 57(j) and § 726(a)(4) is meaningless.

Appellee's remaining arguments pertain to the merits of the decision in *West Texas Marketing*. Appellee contends that the decision is not based on any case authority; that the court looked only to the form, not the substance, of the DOE's claim; that the DOE's claim is for a penalty rather than for restitution given that the indirect compensation to be received by the DOE violates the policy of the bankruptcy laws to distribute available funds to those creditors with actual identifiable losses; that this policy was ignored by the court; and that the court ignored relevant case authority pertaining to Section 57(j).

The Court rejects Appellee's arguments and finds that the findings enunciated in *West Texas Marketing* control the instant controversy. The Temporary Emergency Court of Appeals has exclusive appellate jurisdiction to construe ESA and EPAA provisions. In *West Texas Marketing*, the court, relying on the plain language of Section 209, held that the DOE's claim was for restitution and did not constitute a penalty. *West Texas Marketing*, 763 F.2d at 1426.

As in *West Texas Marketing*, the DOE in this case also sought restitution pursuant to Section 209 for illegal overcharging from the sale of crude oil. Thus, as in *West Texas Marketing*, the remedy sought by the DOE is also restitutionary.

With respect to Appellee's contention pertaining to pecuniary loss, *West Texas Marketing* is again controlling. *West Texas Marketing* held that the question of "pecuniary loss' sustained by the holder of a claim is only considered when a penalty is involved. Since the DOE's claim was for restitution, the court reasoned that the issue of whether the DOE sustained "pecuniary loss" was immaterial.

As in the case at bar, *In re Compton Corp.* and *In re Seneca Oil Co.*, 76 B.R. 818 (W.D. Okl. 1987) also considered arguments suggesting that the respective courts should consider bankruptcy policy and bar all claims against a bankrupt in the absence of pecuniary loss. While acknowledging this policy, both courts nevertheless rejected this argument. *In re Compton*, 90 B.R. at 801; *In re Seneca Oil Co.*, 76 B.R. at 820.

> The appellees herein ("the Bank Group") argue that the TECA decision in *West Texas Marketing* is not binding on the Bankruptcy Court in this case, citing *Simonson v. Granquist*, 369 U.S. 38, 82 S.Ct. 537, 7 L.Ed.2d 557 (1962). The Bank Group argues that *Simonson* makes clear the congressional purpose to bar all claims of any kind against the bankrupt except those based on a pecuniary loss. . . . The Bank Group urges that TECA's decision in *West Texas Marketing* that the issue of pecuniary loss is immaterial is directly at odds with the Supreme Court holding in *Simonson*. The Court is unpersuaded. The Court believes that the Court of Appeals decision in *West Texas Marketing* on the exact issue now before

> the Court is more compelling than the Supreme Court's interpretation of the penalty provision of the Bankruptcy Code in a tax context.

In re Seneca Oil Co., 76 B.R. at 820.

For the foregoing reasons, the Court finds that *West Texas Marketing* controls the instant controversy and that the DOE's claim was improperly subordinated to the extent that the DOE was unable to specifically identify overcharge victims.

IT IS THEREFORE ORDERED that the decision of the bankruptcy court subordinating the Department of Energy's claim to the extent that the Department of Energy does not identify specific overcharge victims is REVERSED.

IT IS FURTHER ORDERED that the Department of Energy is granted an allowed unsecured claim for $372,151.67.

DATED: August 17, 1990

Philip M. Pro

PHILIP M. PRO
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 1991, I caused copies of the foregoing Department of Energy's Motion to Transfer This Appeal to the Temporary Emergency Court of Appeals to be served by first class mail, upon the following:

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APPENDIX I

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FILED
ILLEGIBLE

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 91-15357

IN RE:
TRANSCONTINENTAL ENERGY CORPORATION,
Debtor.

RICHARD A. DAVIS, TRUSTEE,
Appellant,

v.

UNITED STATES DEPARTMENT OF ENERGY,
Appellee.

OPPOSITION TO APPELLEE'S MOTION TO TRANSFER THIS APPEAL TO THE TEMPORARY EMERGENCY COURT OF APPEALS

Comes now the Appellant, Trustee Richard A. Davis, by and through his undersigned counsel, and hereby opposes APPELLEE'S MOTION TO TRANSFER THIS APPEAL TO THE TEMPORARY EMERGENCY COURT OF APPEALS.

This opposition is made and based on the accompanying Memorandum of Points and Authorities and the entire file and pleadings therein.

DATED this 25th day of April, 1991.

CORY, MACDONALD, RIRIE & VAN

/s/Timothy S. Cory

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

FACTS AND PROCEDURAL HISTORY

1. Transcontinental Energy Corporation ("TEC"), a Nevada Corporation, filed a petition for bankruptcy under Chapter XI of the Bankruptcy Act of 1898, as amended, on October 14, 1977.[1]

2. By order dated October 21, 1977, the court appointed Robert N. Broadbent as Receiver. On October 5, 1978, TEC was adjudicated bankrupt, and Mr. Broadbent was appointed Trustee. In March 1981, Richard A. Davis succeeded Mr. Broadbent as Trustee.

3. Interests in two oil wells in long Beach, California, the "Moore Well' and the "Harison Lease", were among the assets of the Bankrupt at the time of filing.

4. TEC was engaged in the business of producing and selling crude oil from 1975-80, during the period when mandatory petroleum price and allocation regulations were in effect. In late 1978, the DOE conducted an audit of TEC's pricing practices, which audit resulted in the issuance of a notice of probable violation by the DOE to TEC on March 30, 1979.

5. The DOE filed a proof of claim in this case on April 4, 1979, and an amended proof of claim on October 22, 1985, for overcharges revealed by the above-referenced audit.

6. The Trustee filed an objection to the DOE's claim on December 4, 1980, as to both the validity and the calculation of the alleged overcharges. The Trustee also argued that the

---

[1]It is important to note that this is a proceeding under the "Old Act."

claim was a penalty and should be disallowed under Section 57j of the "Act".

7. On November 25, 1985, the DOE filed a motion for summary judgement. The trustee filed an opposition to the DOE's motion and a cross motion for summary judgment on January 31, 1986.[2] On March 7, 1986, the DOE filed its reply to the Trustee's opposition and its opposition to the Trustee's motion. The Trustee replied to the DOE's opposition on May 8, 1986.

8. On January 27, 1989, Bankruptcy Judge, Lawrence Ollason entered his Findings of Fact and Conclusion of Law vacating his minute entry order of August 19, 1986 and held that DOE's claim to recover restitution valid and payable to identified overcharged victims, and otherwise subordinated to general unsecured claims.

9. DOE then moved the Bankruptcy Court to reconsider its Findings of Fact and Conclusions of Law regarding the subordination of its claim.

10. On June 22, 1989, the Bankruptcy Court issued an Order denying the DOE's Motion for Reconsideration with respect to the subordination of the DOE's claim , and the DOE appealed.

11. The Appeal was fully briefed and submitted to the District Court for decision on March 26, 1990.

12. On August 20, 1990, United States District Judge Phillip M. Pro found that *West Texas Marketing* controls the instant controversy and that the DOE's claim was improperly subordinated to the extent that the DOE was uanble to specifically identify overcharged victims.

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[2]The Trustee raised exclusively the bankruptcy argument that the DOE's claim was a penalty under the Act.

13. The Bankruptcy Court's Findings of Fact and Conclusions of Law were reversed by the United States District Court. (See Exhibit "1").

14. On August 23, 1990, Appellee, Richard A. Davis, appealed the Judgment entered in the United States District Court on August 20, 1990. This matter is now before this on review.

II.

ARGUMENT

A. STANDARD OF REVIEW

The District Court had jurisdiction over the appeal from the Bankruptcy Court under 28 U.S.C. Section 158(a). The Ninth Circuit Court of Appeal's reviews District Court's decision de novo, on appeal from an order affirming or reversing judgments of the Bankruptcy Court. *In re Arizona Appetito's Stores, Inc.*, 893 F.2d 216 (9th Cir. 1990).

B. APPELLATE JURISDICTION PURSUANT TO 28 U.S.C. SECTION 1291

28 U.S.C. Section 1291 provides that:

> "The court of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . "

Appellant has premised jurisdiction upon 28 U.S.C. Section 1291, because the opinion from which the appeal is sought was an opinion of the district court sitting in bankruptcy, not of the bankruptcy court. *Harris v. McCauley (In re J.D. McCauley)*, 814 F.2d 1350, 1351 (9th Cir. 1987); *Cannon v. Hawaii, Corp., (In re Hawaii Corp.)*, 796 F.2d 1139, 1141

(9th Cir. 1986); *Klenske v. Guo (In re Manua Fin. Co.)*, 781 F.2d 1370, 1372 (9th Cir. 1986) (per cariam), *cert. denied sub nom. Yamnmoto v. Klenske*, 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed. 2d 997 (1987).

This appeal comes from a federal district judge sitting in bankruptcy. Appellate jurisdiction over appeals from district judges sitting in bankruptcy exists under 28 U.S.C. Section 1291, the statutes governing appeals from the final decisions of a district court. *Matter of Hawaii Corp.*, 796 F.2d 1139 (9th Cir. 1986).

C. THIS COURT SHOULD RETAIN THIS APPEAL AND DECIDE THE BANKRUPTCY LAW QUESTIONS RAISED HEREIN

The Temporary Emergency Court of Appeals (TECA) has exclusive jurisdiction to decide issues arising under Economic Stabilization Act ("ESA") of 1970, Pub.L. No. 91-379, Section 202, 84 Stat. 799, 799 (1970), as amended by Economic Stabilization Act Amendments of 1971, Pub.L. no. 92-210, Section 203(a), 85 Stat. 743, 744 (1971), or the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. Section 751.

However, in deciding whether the TECA or this court has jurisdiction, inquiry must be conducted into the claim raised by the DOE in this appeal. "The crucial question is whether the case involves issues that must be decided by TECA in order that uniform interpretation of the substantive provision of the statute may be achieved." *United States v. Uni Oil, Inc.*, 646 F.2d 946, 951 (5th Cir. 1981) (quoting Bray, 423 U.S. at 75, 96 S.Ct. at 309). *cert. denied*, 455 U.S. 908, 102 S.Ct. 1254, 71 L.Ed. 2d 446 (1982).

In re Seneca Oil Co., 906 F.2d 1445 (10th Cir. 1990) the validity of the pricing and restitution regulations of DOE's ap-

plication had already been adjudicated before the Temporary Emergency Court of Appeals. The question before the Court of Appeals was whether the restitution claim was a fine, penalty, or forfeiture within the meaning of the Bankruptcy Code. The appeal was from a decision regarding the priority of the restitution claim in bankruptcy. It was bankruptcy law that determined the priority of the DOE's claim in bankruptcy. The ESA and EPAA provided only the backdrop for the issue of the Priority of DOE's claim. DOE relied upon TECA's decision in *Department of Energy v. West Texas Marketing Corp.*, 763 F.2d 1411, to support its argument that the TECA had exclusive jurisdiction over its claim. The Court of Appeals held that "the issue of whether a claim is a fine, penalty, or forfeiture under federal bankruptcy law is a bankruptcy rather than an ESA/EPAA question over which the Court of Appeals and not the TECA has jurisdiction. *In re Seneca Oil, supra*, at 1455.

Appellee seeks to transfer this matter pursuant to 28 U.S.C. Section 1631 to the Temporary Emergency Court of Appeals for findings that the district court enunciated by relying on the *United States Department of Energy v. West Texas Marketing Corp.*, 763 F.2d 1411, 1423-24 (TECA 1985). This same issue was discussed and decided in *In re Seneca Oil Co.*, 906 F.2d 1445, 1455 (10th Cir. 1990) where the court stated ". . . we believe that the issue of whether a claim is a fine, penalty, or forfeiture under Federal bankruptcy law is a bankruptcy rather than an ESA/EPAA question, we disagree with the TECA's jurisdictional analysis in *West Texas Marketing*." The Tenth Circuit Court of Appeals correctly held that TECA did not have exclusive appellate jurisdiction over matters involving issues of whether a claim is a fine, penalty, or forfeiture under Federal bankruptcy law. Appellee's claim was filed subsequent to bankruptcy jurisdiction, this fact is undisputed, therefore Federal bankruptcy law is applicable and jurisdic-

tion over this appeal is properly before the Ninth Circuit Court of Appeals. Further, 28 U.S.C. Section 1631 provides in pertinent part:

> "Whenever . . . an appeal . . . filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice transfer such action or appeal. . ."

Nothing in the language of 28 U.S.C. Section 1631 suggests that transfer is mandatory without first considering the underlying procedural history of the case to determine whether there is a want of jurisdiction. In the instant case jurisdiction is proper pursuant to 28 U.S.C. Seciton 1291. The Ninth Circuit Court of Appeals reviews district court's decision de novo, on appeal from an order affirming or reversing judgments of the Bankruptcy Court.

CONCLUSION

For the above-stated reasons, Appellant asks that Appellee's Motion to Transfer this matter be denied.

DATED this 25th day of April, 1991.

CORY, MACDONALD, RIRIE & VAN

/s/Timothy S. Cory

TIMOTHY S. CORY , ESQ.
300 S. Fourth Street, #1404
Las Vegas, Nevada, 89101
Attorney for Appellant
Richard A. Davis.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a copy of the OBJECTION APPELLEE'S MOTION TO TRANSFER THIS APPEAL TO THE TEMPORARY EMERGENCY COURT OF APPEALS, appeal no. 91-15357, bankruptcy no. BK-S-77-730 LO, on the below listed party, by mailing a true and correct copy through the United States Postal Service, postage prepaid, first class, on the 26th day of April, 1991.

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AN EMPLOYEE OF
CORY, MACDONALD, RIRIE & VAN

APPENDIX J

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 91-15357
DC# CV-89-00840-PMP
Nevada (Las Vegas)

FILED
MAY 23 1991
CATHY A. CATTERSON,
CLERK U.S.
COURT OF APPEALS

IN RE:
TRANSCONTINENTAL ENERGY CORPORATION,
Debtor.

RICHARD A. DAVIS, TRUSTEE,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF ENERGY,
Defendant-Appellee.

ORDER

Before: TANG, REINHARDT and THOMPSON, Circuit Judges

Appellee moves to transfer this appeal to the Temporary Emergency Court of Appeals (TECA). Appellant's opposition to the motion has been filed and considered.

The TECA was established by the Economic Stabilization Act of 1970 (the Act) and empowered with "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under [the Act]." 12 U.S.C. § 1904 note, as incorporated in the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. § 754(a)(1). The district court order, which is the subject of this appeal,

centers on the bankruptcy court's treatment of a claim filed against the debtor by the Department of Energy (DOE) pursuant to Section 209 of the Act.

Appellee relies on *U.S. Dept. of Energy v. West Texas Marketing Corp.*, 763 F.2d 1411 (TECA 1985) in arguing that TECA has exclusive jurisdiction over the order. Appellant relies on the conflicting ruling of *In re Seneca Oil Co.*, 906 F.2d 1445 (10th Cir. 1990) in arguing that this court may hear the appeal. We agree with the TECA's holding in *West Texas Marketing Corp.*, that the DOE's claim arose under the act and determining its treatment in bankruptcy court requires reference to the Act. Accordingly, the motion to transfer the appeal is granted.

APPENDIX K

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

NO. 9-105

IN RE:
TRANSCONTINENTAL ENERGY CORPORATION,
Debtor.

RICHARD A. DAVIS, TRUSTEE,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF ENERGY,
Defendant-Appellee.

Appeal from the United States District Court for the District of Nevada
(District Court No. CV-89-00840-PMP)
(Submitted On The Briefs)
(Decided: October 31, 1991)

Don W. Crockett, Ricahrd F. Ahern and Allan Finkel, Judicial Litigation Division, Economic Regulatory Administration, United Sates Department of Energy, Washington, D.C., for Appellee.

TIMOTHY S. CORY, of Cory, McDonald, Ririe and Van, Las Vegas, Nevada, for Appellant.

Before Christensen, Daugherty and Brown, Judges.

Per Curiam.

This appeal revisits, with a little change of scenery, the central issue decided in *U.S. Dept. of Energy v. West Texas Marketing Corp.*, 763 F.2d 1411 (Em. App. 1985). The above-named trustee has appealed an order of the district court which allowed a bankruptcy claim of the Department of Energy ("DOE") as an unsecured one in the amount of $372,151.67, and rejected the trustee's contention that the claim must be subordinated as a penalty. We now affirm.[1]

Transcontinental Energy Corporation, a Nevada corporation ("Transcontinental"), filed a petition in bankruptcy under Chapter 11 of the Bankruptcy Act of 1898. The DOE filed a proof of claim in that proceeding based upon overcharges made by Transcontinental in the sale of crude oil in violation of section 209 of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. § 1904, n., as incorporated by reference along with jurisdictional provisions pertaining to this court by the Emergency Petroleum Allocation Act, 15 U.S.C. § 754(a)(1).

The trustee filed an objection to the DOE's proof of claim, contesting the merits of the DOE's underlying allegation and asserting that the claim was for a "penalty" which must be disallowed under section 57(j) of the Bankruptcy Act.[2] The bankruptcy judge held initially that the DOE's claim constituted a penalty. On appeal from this ruling, the district court reversed in reliance upon our decision in *West Texas Marketing* and

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[1]Appellee the DOE, pursuant to Rule 26 of the General Rules of this court, initially filed a motion to affirm, which we denied to permit full consideration on the briefs. The case was thereupon placed on our Summary Calendar by Chief Judge Garza. TECA General Rule 27.

[2]Thereafter § 57(j) of the Bankruptcy Act was replaced in 1978 by 11 U.S.C. § 726(a)(4) of the Bankruptcy Code. The latter provision "subordinates" rather than "disallows" penalty claims, a difference which the district court considered immaterial to its order, as do we, and not questioned on this appeal.

allowed the DOE's otherwise uncontested claim in the amount of $372,151.67.

The issue presented here by appellant is whether the district court correctly determined that the DOE's allowed claim for the crude oil overcharges should have been subordinated as a penalty in whole or in part to other unsecured claims.

In its initial consideration of this issue, the bankruptcy judge granted summary judgment in favor of the trustee on the theory that the DOE's claim was for a penalty rather than restitution, relying upon a bankruptcy court decision in *In re Compton Corp.*, 40 B.R. 880 (B.C.N.D. Tex. 1984). But in light of the intervening reversal of that decision by the district court on the basis of *West Texas Marketing*, *see In re Compton Corp.*, 90 B.R. 798 (N.D. Tex. 1988), the bankruptcy judge reconsidered his decision, thereupon determining that the DOE claim was indeed one for "restitution" which "may not be disallowed as a penalty." He held, nonetheless, that "no amount may be paid to the DOE for post-petition interest or for payment to state or federal treasuries if to do so would impair any of the general unsecured creditors with allowed claims or would otherwise constitute a preference of identifiable overcharge victims.

Upon appeal to the district court, Judge Pro recognized such ruling for what it was, "a treatment of DOE's claim as a penalty to the extent that DOE does not identify specific overcharge victims under applicable pricing laws," in contravention of *West Texas Marketing*. After analyzing and rejecting the bankruptcy court's other reasoning to the contrary, Judge Pro concluded:

> For the foregoing reasons, the Court finds that *West Texas Marketing* controls the instant controversy and that the DOE's claim was improperly subordinated

to the extent that the DOE was unable to specifically identify overcharge victims.

IT IS THEREFORE ORDERED that the decision of the bankruptcy court subordinating the Department of Energy's claim to the extent that the Department of Energy does not identify specific overcharge victims is REVERSED.

IT IS FURTHER ORDERED that the Department of Energy is granted an allowed unsecured claim for $372,151.67.

Order of August 17, 1990, p. 12.

Appellant in essence argues that it was error for the district court not to accept the bankruptcy judge's "findings of fact" to the contrary, that our decision in *West Texas Marketing* was "flawed" as applied to this case, and that the district court erred by failing to consider the policy fo the bankruptcy laws to distribute available funds to credtiors who have suffered actual losses and who have specific identifiable claims. The appellant cites *In re Seneca Oil Company*, 906 F.2d 1445 (10th Cir. 1990), for the proposition that "although non-bankruptcy law creates the DOE claim here, it is bankruptcy law that determines the priority of that claim in bankruptcy." The Tenth Circuit reached the same conclusion as *West Texas Marketing* regarding the restitution/penalty priority issue, recognizing that the "DOE's claim was brought pursuant to Section 209 of the ESA," 906 F.2d at 1456, but disagreed with *West Texas* only in respect to jurisdiction.[3]

[3]Our jurisdiction in the present case is not questioned by either party and we find it to be clear. This appeal was initially filed with the United States Court of Appeals for the Ninth Circuit which agreed with our determination in *West Texas Marketing* that the TECA had jurisdiction and rejected the contrary reasoning of the Tenth Circuit in *In re Seneca Oil*.

Finding these and all other related arguments of appeallant unpersuasive, we affirm the order of the district court.

Richard A. Davis, Trustee v. United States Department of Energy, (No. 91-15357, 9th Cir. May 23, 1991). The Fifth Circuit also recognized the-jurisdiciton of the TECA by transferring the appeal concerning a similar bankruptcy court ruling to this Court. *See Re Compton Corp.*, 889 F.2d 1104, 1105 (Em. App. 1989). That appeal was dismissed for lack of jurisdiction not in departure from *West Texas Marketing* but by reason of the lack of finality of the order below which had left open for future determination the amount of the claim there in question. In the case now before us, the amount of the claim, as well as its unsecured and non-penalty status, was finally determined by the district court within the separate judicial unit involved. *See Re Compton Corp.*, 889 F.2d at 1106.

(2)

No. 91-1803

Supreme Court, U.S.
FILED
1992

In the Supreme Court of the United States

OCTOBER TERM, 1992

RICHARD A. DAVIS, TRUSTEE, PETITIONER

v.

UNITED STATES DEPARTMENT OF ENERGY

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS FOR THE UNITED STATES

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the petition for a writ of certiorari is untimely under Section 211(g) of the Economic Stabilization Act of 1970 because it was not filed within 30 days of the entry of judgment by the Temporary Emergency Court of Appeals.

2. Whether a claim by the Department of Energy in a bankruptcy proceeding for illegal crude oil overcharges is restitutionary in nature when some of the overcharge victims cannot be specifically identified.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1803

RICHARD A. DAVIS, TRUSTEE, PETITIONER

v.

UNITED STATES DEPARTMENT OF ENERGY

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS FOR THE UNITED STATES

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals (TECA), Pet. App. 94a-98a, is reported at 950 F.2d 733. The opinion of the district court, Pet. App. 39a-49a, is reported at 4 Energy Mgmt. (CCH) ¶ 26,638. The order of the bankruptcy court, Pet. App. 1a-8a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1991. The petition for a writ of certiorari was filed on January 29, 1992. By letter dated February 21, 1992, the Clerk of this Court returned the petition as untimely because it was not filed within 30 days after

entry of judgment as required by Temp. Emer. Ct. App. Rule 32.[1] On May 8, 1992, petitioner filed a Motion for Reconsideration of Petition for Writ of Certiorari and argued that the petition was timely under Rule 13 of the Rules of this Court.[2] The Clerk then docketed the petition effective January 29, 1992. The jurisdiction of this Court is sought to be invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1977, Transcontinental Energy Corporation (Debtor) declared bankruptcy under Chapter 11 of the Bankruptcy Act. After Debtor was adjudicated bankrupt, petitioner was appointed trustee in the bankruptcy proceeding. Pet. App. 1a. In 1979, respondent filed a proof of claim in bankruptcy court based on illegal overcharges received by Debtor from crude oil sales. *Id.* at 2a.

Petitioner objected to respondent's claim to the extent respondent could not specifically identify the overcharge victims. Under these circumstances, petitioner asserted that the claim sounded more in the nature of a "penalty," which is disallowed under the Bankruptcy Act. Pet. App. 2a-4a. The bankruptcy court accepted that contention in part. Although the court held that respondent's "claim is a claim for restitution which may not be disallowed as

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[1] Temporary Emer. Ct. App. Rule 32 provides:

> Section 211(G) of the Economic Stabilization Act, as amended, provides "Within 30 days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States."

[2] Supreme Court Rule 13.1 provides in relevant part:

> A petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by * * * a United States court of appeals * * * shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment.

a penalty," *id.* at 5a, it nevertheless held that the claim must be subordinated to other unsecured claims to the extent respondent could not identify the overcharge victims. *Id.* at 6a.

2. The district court reversed. It determined, as had the bankruptcy court, that respondent's claim was for restitution. Pet. App. 47a, citing *Department of Energy* v. *West Texas Marketing Corp.*, 763 F.2d 1411 (Temp. Emer. Ct. App. 1985). But the court also found that the bankruptcy court had erred as a matter of law in subordinating respondent's claim "to the extent that [respondent] was unable to specifically identify overcharge victims." Pet. App. 49a. The court explained that the bankruptcy court's dissatisfaction with "the effectiveness of [respondent] in distributing funds collected to the actual parties who were overcharged cannot change the restitutionary character of [respondent's] claim." *Id.* at 44a, quoting *West Texas Marketing Corp.*, 763 F.2d at 1426.[3]

3. Petitioner appealed to the Ninth Circuit. Respondent moved to transfer the case to the TECA. Concluding that the TECA has exclusive jurisdiction, the Ninth Circuit transferred the appeal. Pet. App. 92a-93a.

After briefing, the Chief Judge of the TECA put the case on the summary calendar. Pet. App. 95a n.1. On

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[3] The government reimburses unidentified overcharge victims indirectly by distributing the overcharges to the treasuries of the affected state and federal governments. Such indirect restitution is required in crude oil overcharge cases because, under respondent's "Entitlements Program," the cost of all crude oil, including overcharges, is effectively spread among all refiners and ultimately to all purchasers of refined petroleum products in the United States. See *United States* v. *Exxon Corp.*, 773 F.2d 1240, 1274, 1280-1286 (Temp. Emer. Ct. App. 1985), cert. denied, 474 U.S. 1105 (1986); *In re Seneca Oil Co.*, 906 F.2d 1445, 1456 (10th Cir. 1990).

October 31, 1991, the court unanimously affirmed in a per curiam opinion. *Id.* at 94a-98a. The court explained that "[t]his appeal revisits, with a little change of scenery, the central issue decided in" *Department of Energy* v. *West Texas Marketing Corp.*, *supra*. Pet. App. 95a. After summarizing the facts, the court reaffirmed that under *West Texas Marketing Corp.*, respondent's claim is restitutionary, is not properly treated as a penalty, and is not subject to subordination to the claims of other creditors simply because respondent is unable to identify certain of the overcharge victims. *Id.* at 96a-97a. The court noted that its analysis is fully consistent with the conclusion of the Tenth Circuit in *In re Seneca Oil Co.*, 906 F.2d 1445 (1990).

ARGUMENT

1. Although TECA's judgment was entered on October 31, 1991, the petition for a writ of certiorari was not filed until January 29, 1992. Because petitioner failed to file the petition within 30 days after entry of TECA's judgment as required by Section 211(g) of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. 1904 note (1976), as incorporated in Temp. Emer. Ct. App. Rule 32, the petition in this case is jurisdictionally out of time.

Petitioner contends (Petitioner's Motion for Reconsideration of Petition for Writ of Certiorari at 2-3 (May 8, 1992)) that litigants may disregard the 30-day limit in Temp. Emer. Ct. App. Rule 32 because the limit is merely precatory, as the rule provides that a petition for a writ of certiorari "may" be filed within 30 days after entry of the TECA judgment. Petitioner asserts that the petition in this case is timely pursuant to Supreme Court Rule 13.1, which provides that a petition for a writ of certiorari to review a judgment in a civil case "shall be deemed in time when it is filed * * * within 90 days after the entry of judgment."

That contention lacks merit. Congress enacted a variety of measures designed to expedite legal proceedings under the ESA. Congress not only created the TECA as a separate court of appeals to resolve disputes arising under the ESA, it shortened the time for filing notices of appeal to that court from 60 to 30 days.[4] Congress also shortened the time for filing a petition for a writ of certiorari to the TECA in this Court from 90 to 30 days:

> Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code.

ESA § 211(g), Pub. L. No. 91-379, 84 Stat. 799, as amended by Pub. L. No. 92-210, 85 Stat. 743 (12 U.S.C. 1904 note (1976)).

This Court has recognized that the 30-day limit established by Congress for seeking certiorari from TECA judgments is "jurisdictional" and "obviously directed at expediting review." *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 246 n.1 (1982) (per curiam); see also R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 303 (6th ed. 1986). Because petitioner failed to comply with the applicable time limit for seeking certiorari, this Court lacks jurisdiction over the petition. *Matton Steamboat Co.* v. *Murphy*, 319 U.S. 412 (1943) (per curiam); *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942).

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[4] See ESA § 211(e)(2), 84 Stat. 800 (12 U.S.C. 1904 note (1976)), incorporated by reference in the Emergency Petroleum Allocation Act, 15 U.S.C. 754(a) (1976); Temp. Emer. Ct. App. R. 15(a). See also Temp. Emer. Ct. App. R. 3 Historical Notes.

Even if the 30-day limit were deemed not to be jurisdictional,[5] petitioner's late filing is not justified in this case. Petitioner's attorney failed to comply with the 30-day limit because he "decided to exercise his discretion pursuant to [TECA Rule 32] to file the writ of certiorari according to Supreme Court Rule 13." See Affidavit of Timothy S. Cory at 1, Attached to Petitioner's Motion For Reconsideration Of Petition For Writ Of Certiorari (May 8, 1992). Petitioner's decision to proceed in that fashion, rather than to comply with applicable time limits, does not warrant departure from the time limit established by Congress.

2. In any event, the TECA's per curiam affirmance of the district court's judgment does not warrant further review. Petitioner asserts (Pet. 6-7) that the district court and the TECA erred in failing to defer to the bankruptcy court's factual finding that respondent's claim constitutes a penalty to the extent that specific victims cannot be identified. Even if that were true, it would raise at most a fact-specific claim that is not worthy of this Court's attention.

Contrary to petitioner's contention, however, this is not a case where the reviewing courts improperly substituted their views of the facts for that of the bankruptcy court. Rather, the district court and the TECA correctly applied governing legal standards, as to which there is no conflict, and held, as a matter of law, that respondent's full claim is for restitution despite the fact that respondent cannot identify all the overcharge

[5] When a time limit is jurisdictional, it may not be waived because of extenuating circumstances. See, *e.g.*, *Deal* v. *Cincinnati Board of Education*, 402 U.S. 962 (1971) (untimely petition denied where delay was attributed to airline losing all the papers); *Teague* v. *Regional Commissioner of Customs*, 394 U.S. 977 (1969) (untimely petition denied where delay attributed to postal delay caused by unforeseeable snowstorm).

victims. See *Department of Energy* v. *West Texas Marketing Corp.*, 763 F.2d 1411, 1426 (Temp. Emer. Ct. App. 1985) (holding that overcharge claims by the Department of Energy (DOE) in a bankruptcy proceeding were restitutionary despite the fact that DOE could not specifically identify the overcharge victims); see also *In re Seneca Oil Co.*, 906 F.2d 1445, 1455 n.14 (10th Cir. 1990) (claim by DOE for recovery of crude oil overcharges in a bankruptcy proceeding was restitution).[6] As the court explained in *Seneca Oil*, although the money sought by DOE may not go directly to all the overcharged purchasers, DOE nevertheless seeks the money on their behalf, and Congress intended this type of recovery to be restitution (*id.* at 1456):

> Under the Petroleum Overcharge Distribution and Restitution Act of 1986 ("PODRA"), 15 U.S.C. §§ 4501 *et seq.*, the DOE is obligated to attempt to identify and compensate overcharged purchasers. 15 U.S.C. § 4502(b). Any remaining funds are then to be distributed as "indirect restitution" to states for energy conservation programs and to the Federal treasury. 15 U.S.C. §§ 4502(d), 4503. Clearly, Congress, in enacting the PODRA, envisioned that the DOE's recovery for overcharges was restitutionary in nature.

Because that characterization of DOE's objective and Congress's plan for distribution of the funds is plainly

[6] The TECA and the Tenth Circuit disagree regarding the exclusivity of the TECA's jurisdiction in this type of case. In this case, the Ninth Circuit held, correctly in our view, that the TECA has exclusive jurisdiction. Pet. App. 93a. This case does not present an appropriate opportunity to resolve the jurisdictional issue, however, because petitioner did not raise it in the TECA, *id.* at 97a n.3 ("[o]ur jurisdiction in the present case is not questioned by either party"), nor does he raise it in this Court. See Pet. i.

correct, and because there is no conflict on this issue, further review is unwarranted.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] Petitioner asserts (Pet. 8) that "this Court must determine whether Section 57(j) of the Bankruptcy Act applied in the instant case or the new version 11 U.S.C. Section 726(a)(4)." That claim lacks merit. First, petitioner failed to raise that issue on appeal and is therefore precluded from raising it here. Second, the TECA and the district court correctly held that the difference between the two provisions is "immaterial". Pet. App. 95a n.2.